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2000

Complaint.

Judgment Record.

In the Passaic Circuit Court.

10

FANNY SAPER, administratrix,
&c., of Louis Saper, deceased,
Plaintiff,

vs.

JOHN BAKER and LILLIAN
BAKER,

Defendants.

*Judgment
Record.*

20

John Baker and Lillian Baker, the defendants in this cause, were summoned to answer unto Fanny Saper, administratrix, &c., of Louis Saper, deceased, the plaintiff therein, in an action at law upon the following complaint:

Plaintiff, by Ward & McGinnis and Jacob Kaplan, her attorneys, complain—of the defendant—as follows:

1. That the plaintiff is a resident of the city of Passaic, county of Passaic and State of New Jersey, and is the administratrix of the said Louis Saper, deceased, who at his death was a resident of Passaic, county of Passaic and State of New Jersey.

30

2. That the said Louis Saper died on November 1, 1916, and the plaintiff, Fanny Saper, was, by the Surrogate of the County of Passaic, appointed administratrix of the said Louis Saper, deceased, on November 17, 1916.

40

Complaint.

3. That the defendants are residents of the city of Passaic, county of Passaic and State of New Jersey.

4. That the defendant John Baker is the father of the defendant, Lillian Baker.

10. 5. That at the time of the committing of the grievances hereinafter mentioned, on to wit, November 1, 1916, there was situate in the city of Passaic, county of Passaic and State of New Jersey, a certain public street known as Jefferson street, which street runs in a generally easterly and westerly direction, and is intersected by a certain other public street known as Hope avenue, which runs in a northerly and southerly direction.

20. 6. That at the time of the committing of the grievances hereinafter mentioned, to wit, November 1, 1916, the defendant was the owner of a certain automobile of the touring car type.

7. That on November 1, 1916, between about the hours of five thirty and six o'clock in the afternoon, the said automobile of the defendant was then and there being driven along Jefferson street in a westerly direction, by the defendant, Lillian Baker.

30. 8. Plaintiff avers that at the time of the committing of the grievances hereinafter mentioned, the said Lillian Baker was operating the said automobile under orders and directions of the said John Baker.

40. 9. Plaintiff avers that said automobile at said time was driven by the said defendant, Lillian Baker as the agent, servant or employee of the defendant, John Baker, under or by, or as a result of his orders, directions or request.

Complaint.

10. Plaintiff avers that while the said automobile of the defendant, John Baker, was then and there being driven along Jefferson street, as aforesaid, in a westerly direction, along the right side thereof, the said deceased Louis Saper, was then and there propelling a wheel-barrow also along Jefferson street in a westerly direction, and at a point in front of said automobile and in plain sight thereof. 10

11. That while the said Louis Saper, deceased, was so propelling said wheel-barrow, the said automobile of John Baker, so driven by Lillian Baker, as aforesaid, under the orders and directions of John Baker, as aforesaid, was carelessly, negligently and improperly run and operated by the said Lillian Baker, at an excessive rate of speed; and carelessly, negligently and improperly run and operated by her without the giving of any warning of her approach; and she, the said Lillian Baker, well knowing that the said Louis Saper, was then and there propelling the said wheel-barrow along said Jefferson street, in a westerly direction, in front of said automobile, carelessly, negligently and improperly failed to check the speed of the automobile, or to guide or steer the same so that she would not run into the said Louis Saper; and carelessly, negligently and improperly ran, operated, managed, steered and propelled said automobile, that by reason of the premises, the said Louis Saper was run upon by the said automobile and run over and crushed, and received such injuries that he thereupon died. 20 30

12. Plaintiff avers that the said Louis Saper, deceased, was forty-two years of age, and left surviving his widow, Fanny Saper, who is the 40

Complaint.

administratrix herein, who is forty years of age, and one daughter, Lena, who is *ten* years of age, and who are the only next of kin of the said Louis Saper, deceased.

10 13. Plaintiff avers that this action was commenced within twenty-four calendar months after the date of the accident.

14. Plaintiff avers that by reason of the premises, a right of action has accrued to the administratrix for the benefit of the next of kin of Louis Saper, deceased, to the amount of \$15,000 for which she will claim judgment.

WARD & McGINNIS,
JACOB KAPLAN,
Attorneys of Plaintiff.

20

30

40

Answer.

Answer.

The defendants answered as follows:

Defendants, residing in the city of Passaic, county of Passaic and State of New Jersey, say that: 10

1. They have not any knowledge or information sufficient to form a belief as to the contents of paragraph one of the complaint and leave the plaintiff to her proof thereof.

2. They have not any knowledge or information sufficient to form a belief as to the contents of paragraph two of the complaint and leave the plaintiff to her proof thereof.

3. They admit paragraph three of the complaint. 20

4. They admit paragraph four of the complaint.

5. They have not any knowledge or information sufficient to form a belief as to the contents of paragraph five of the complaint and leave the plaintiff to her proof thereof.

6. They admit paragraph six of the complaint.

7. They admit paragraph seven of the complaint. 30

8. They neither admit or deny the statement in paragraph eight of the complaint, but leave the plaintiff to her proof thereof.

9. They neither admit or deny the statement in paragraph nine of the complaint, but leave the plaintiff to her proof thereof.

10. They have not any knowledge or information sufficient to form a belief as to the con- 40

Answer.

tents of paragraph ten of the complaint and leave the plaintiff to her proof thereof.

11. They deny paragraph eleven of the complaint.

10 12. They have not any knowledge or information sufficient to form a belief as to the contents of paragraph twelve of the complaint and leave the plaintiff to her proof thereof.

13. They have not any knowledge or information sufficient to form a belief as to the contents of paragraph thirteen of the complaint and leave the plaintiff to her proof thereof.

14. They deny paragraph fourteen of the complaint.

20 And for a separate defense, defendants say that the deceased, Louis Saper, at the time of the accident, carelessly and negligently placed himself in a position of danger before an oncoming automobile.

Dated December 13th, 1916.

KALISCH & KALISCH,
Attorneys of Defendants.

30 The above cause being on the list for trial, and the attorney of the plaintiff applying to the court for leave to discontinue said action as against the said Lillian Baker, one of the defendants above set forth,

It is on this 2d day of March, 1917, in accordance with said application, ordered that the above action be and the same is hereby discontinued as against the said Lillian Baker, one of the above defendants.

GEO. S. SILZER,

J.

Postea.

Postea.

This action was tried before Judge George S. Silzer, with a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court, on March 7th, 8th and 9th, A. D. 1917. 10

The cause having been heard and submitted to the jury, they returned their verdict as follows: Four thousand dollars (\$4,000.00), in favor of the plaintiff, and against the defendant, John Baker.

Whereupon, it is adjudged that the plaintiff, Fanny Saper, administratrix of Louis Saper, deceased, recover of the defendant John Baker, the sum of four thousand dollars (\$4000.00), and her costs, which are taxed at the sum of 20

Judgment entered and signed March 15th, A. D. 1917, at 10:50 A. M.

GEO. S. SILZER,
Judge.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC, } ss. 30

I, JOHN J. SLATER, clerk of said county, and clerk of the county courts thereof, Do HEREBY CERTIFY, That the foregoing is a transcript of the Judgment Record, *in re*: Fanny Saper, administratrix, &c., of Louis Saper, deceased, plaintiff, vs. John Baker and Lillian Baker, defendants, as the same is taken from and compared with the original entry thereof in Book "Y" of Circuit Court Judgments for said county, 40

Postea.

on pages two hundred and eighteen, &c., now remaining of record in my office.

IN TESTIMONY WHEREOF, I have here-
(L. s.) unto set my hand and affixed the seal
of the said courts and county, at Pater-
son, this twenty-fifth day of April, A. D. nine-
10 teen hundred and seventeen.

JOHN J. SLATER,
Clerk.

20

30

40

Opening.

Passaic County Circuit Court.

FANNY SAPER, Administratrix
of Louis Saper, deceased,
Plaintiff,

vs.

JOHN BAKER and LILLIAN
BAKER,
Defendants.

10

*Before Hon.
George S.
Silzer, J., and
a Jury.*

Paterson, N. J., March 7th, 1917.

Appearances:

20

Messrs. Ward & McGinnis, for the plaintiff.

Messrs. Kalisch & Kalisch, by Samuel Kalisch,
Jr., Esq., Hon. Wood McKee, for the defend-
ants.

(Jury being empaneled and found satisfac-
tory, they were sworn.)

Mr. Ward then opens for the plaintiff.

Mr. Kalisch then opens for the defendants.

30

Mr. Ward. Counsel agree that if there is
any liability, the liability is on Mr. Baker,
the defendant. Not on Miss Baker.

Mr. Kalisch. If there is any liability at
all. I don't know whether that would re-
lieve the person who drove the car anyway,
even if she acted as the agent of the father.

Mr. McKee. Then the case is discon-
tinued as against Lillian Baker?

Mr. Ward. Yes.

40

Lena Saper, direct.

Mr. Kalisch. We admit that Miss Baker was on Mr. Baker's business at the time of the accident.

Mr. Ward. That the car was being driven by his direction, orders, etc.?

10

Mr. Kalisch. Yes, sir.

Mr. Ward. And on his business?

Mr. Kalisch. Yes, sir, and I understand the action is discontinued against Miss Baker?

Mr. Ward. Yes. And it is also admitted that the death of the plaintiff's intestate was due to the accident?

Mr. Kalisch. Yes, sir.

20 LENA SAPER, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q How old are you? A Nineteen years old.

Q Were you a daughter of Louis Saper? A Yes, sir.

Q Do you remember the time your father suffered this injury and died? A Yes, sir.

30 Q At that time and before that time where were you living? A At the same address where we are living now.

Q Where is that? A Number sixteen Columbia avenue.

Q How old a man was your father? A I guess about forty-two years old.

Mr. Kalisch. Do you know or are you guessing?

40 *The Witness.* I know about that, not just exactly, maybe it is a half year or a year

Lena Saper, direct.

difference, I don't know, it is about forty-two years that he was old.

Mr. Kalisch. I object. Does she know? She does not know the age of her father. It must be merely guesswork.

Objection sustained.

Q What was your father's business? A 10
Painter.

Q Where did he conduct that business? A
In Passaic.

Q What kind of a painter was he? A Con-
tracting.

Q Contracting what?

The Court. House, or pictures or what?

The Witness. House painting, painting 20
houses.

Q Who lived in your family? A What do
you mean?

Q Who was there besides your mother and
you? A My mother and my father and me.

Q The three of you? A Yes, sir.

Q How much rent did you pay?

Mr. Kalisch. Did you pay the rent?

The Witness. Well, no, my father—

Mr. Ward. If you object, object to the 30
Court, but don't ask questions while I am
conducting my examination.

Mr. Kalisch. I object to the question un-
less it appears that she knows of her own
personal knowledge.

Mr. Ward. I withdraw the question.

Q Have you ever paid the rent? A No, sir.

Q Have you ever been present when it was
paid? A Yes, sir. 40

Lena Saper, direct.

Q How much was it?

Mr. Kalisch. Objected to.

Objection overruled; defendant excepts.

A Ten dollars a month.

10 Q Do you know how much coal you used a month there? A What do you mean? A month or a week?

Q A month? A I guess about eight or ten dollars, I cannot tell you exactly. I never paid it.

Q What about the lights? How much was your light bill a month? A The gas bill?

Q Yes? A About two dollars or two dollars and a half.

20 Q Do you know how much you or your mother spent for the household, that is, for the food? A Just for food?

Q Yes? A I guess about twelve or fourteen dollars.

Q I don't want you to guess. Do you know? A Well, I cannot exactly tell you. I never paid it. But my mother, I know she told me.

Q Have you ever been with your mother? A Yes, to buy.

30 Q And, within the last few days have you tried to figure out? A Why, no.

Q I told you to, why didn't you? A What do you mean?

Q Figure out how much it cost you for your food when your father was alive? A Oh, you mean before. I thought you meant now.

Q No, I mean before, when your father was alive? A Well, about twelve dollars.

The Court. A week?

The Witness. Yes, sir.

40 Q You worked, did you not? A Yes, sir.

Lena Saper, direct.

Q Did you give any of the money which you earned to your father? A No, sir.

Q Who supported you? A Any money I got, I spent it.

Q Who clothed you, bought your clothes? A Well, if I did not have enough of my own my mother used to give me of her money to help me. 10

Q Did your mother do any work? A No, sir.

Q Have you any idea how much it cost a year for the clothes for you and your mother?

Mr. Kalisch. Objected to.

The Court. She may answer yes or no.

A I don't think I have.

Q What kind of a man was your father? A In what way? 20

Q Was he a healthy man or an unhealthy man? A He was healthy.

Q Have you got any pictures of him here?

A Yes. There is one (producing).

Q How long had he been in the painting business? A In Passaic about eleven years, all the time at that.

Mr. Ward. I offer the photograph in evidence.

Mr. Kalisch. I object to it as irrelevant and unduly prejudicial to the defendant. 30

The Court. How do you think it is admissible?

Mr. Ward. I had no desire to prejudice the defendant, and I withdraw the offer.

Q Describe your father, if you will, please?

A How he looked?

Q What kind of a looking man he was, how tall and how big? A Well, he was a little 40

Lena Saper, direct.

higher than you, a dark man with a little mustache and whiskers.

Q Do you know whether or not during the time your father was alive he gave your mother any money? A Why, yes.

10 Q Did you see that? A Surely.

Q Do you know what was done with some of that money? A Yes. My mother used to put it in the bank.

Q Have you ever been with her when that was done? A Yes, sir.

Mr. Kalisch. I object to that statement.

The Court. She says she was with her when she did it.

20 *Mr. Kalisch.* Do you know that? Did your mother tell you that?

The Witness. I was with her many times when she used to bring money there.

Q I show you a bank book from the Passaic Trust and Safe Deposit Company, in account with Fanny Saper, do you know whether or not that is the book? A That is the book, yes, sir.

Mr. Ward. We offer the book in evidence.

30 *Mr. Kalisch.* We object to the book. It is in the name of Fanny Saper and I don't see how it is material as to what this deceased earned.

The Court. It has been material to show how much he turned over to his wife.

Mr. Kalisch. It does not necessarily follow that what was in that bank was turned over to her by Mr. Saper.

40 *Mr. Ward.* I will reserve that, then, until Mrs. Saper gets on the stand.

Lena Saper, cross.

Q Did you tell us whether or not your father was a healthy man? A Yes, he was a healthy man.

Q Do you know whether or not he employed any men in his business? A Yes, sir.

Q Who? A Sometimes paper hangers, painters or masons, to help him. 10

The Court. How frequently did he work? How busy was he?

The Witness. He had quite some work. He was always out working.

Cross examination by Mr. Kalisch.

Q You say he was a house painter? A Yes, sir.

Q There was not much house painting in the winter, was there? A Well, in the winter then it is more inside work, but outside and inside painting he done, he works both places. 20

Q He did not do much work in the winter, did he? A May be he did not work one week and then he worked the next week, it is always that way in the painting line.

Q His income was not very steady in the winter, was it? A Well, he used to get money from collecting from the summer time, many times bills was left over. 30

Q His income was not very steady in the winter, was it? A I don't understand that.

Q He did not have a steady income in the winter? A Sometimes not, sometimes more.

Q If you had a pretty cold winter there would not be much painting jobs, would there? A There was inside work.

Q Would he have steady jobs in cold weather even inside? A Not steady, I said, no, sir. 40

Lena Saper, cross.

Q Sometimes he would go for three or four weeks without jobs, wouldn't he? A I don't think so.

Q Do you know? A About a week or two, I know, that is all.

10 Q In each month? A In each of the winter months? A I cannot exactly tell you that, because I don't remember that now.

Q You don't know whether he would go a week or two in a month or may be three or four weeks? A He used to work one week, may be he was home then the next three weeks he was working, then the same thing again. You cannot just tell.

20 Q That would last for about four or five months, wouldn't it, that unsteady income? A Just about two or three months.

Q How do you know your father paid ten dollars a month for coal? A What?

Q How do you know that your father paid ten dollars a month for coal? A How, do you mean? How I know? I used to see the bills.

30 Q How do you know that your father paid ten dollars a month for coal? A I saw the bills. Can't I see bills? I used to write out bills for him, too.

Q He used to pay ten dollars every month for coal? A I did not say ten dollars every month. The bills I saw was mostly ten, or nine or so and was about ten dollars.

Q How many months would he pay that? A Just as much as he need coal.

40 Q How many months? A That is about five or six months. I don't know, I don't count so good.

Lena Saper, cross.

Q Maybe for two or three months? A I think there is more than two or three months in the winter.

Q It was about five or six months? A About five or six months.

Q Six months in the winter, is there? A Yes, sir. 10

Q Where did you work at the time your father was living? A I worked in a paint store.

Q Did your father have a store? A No, sir.

Q What did he have, an office? A Why, no, he did not have any office; just upstairs in his rooms.

Q Anybody who wanted any painting jobs done would come up to his rooms? A Yes, sir. 20

Q And just hire him that way, did they? A Yes, sir. Sometimes he used to get mail he should come down and get a job and so on.

Q Did your father keep any books? A He did keep a little book for himself, but I never took notice of it; he used to tell me to make the bills for him; that is all.

Q Didn't he keep books of his income? A He had a little book in his pocket all the time. 30

Q Did he use to put in that book what his income was? A I guess so.

Q Have you that book? A No, I have not.

Q Where is it? A I don't know; it must have been lost when the accident happened.

Q Do you know what contracts your father had at the time of his death? A What do you mean?

Q Did he have any contracts on hand to do painting jobs? A Why, yes. 40

Ignatz Friedman, direct.

Q Who were the people? A Where we live, the landlord, Zenliner, he came the same evening when he found him lying on the floor; he came to ask him he should do some work for him.

Q And he used to enter all the jobs in the book, didn't he? A Yes, sir.

10 Q And you say you have not got that book?

A No, I don't know where it is.

By Mr. Ward.

Q I show you a card, are these the cards your father used? A Yes, sir.

Mr. Ward. I offer the card in evidence. Admitted and marked "Plaintiff's Exhibit P. 1."

20 The Court then took a recess until two o'clock this day.

AFTER RECESS.

IGNATZ FRIEDMAN, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

30 Q What is your business? A The baker business.

Q Did you know Mr. Saper? A Yes, sir.

Q Did you ever work for him? A He was working for me.

Q When did he work for you? A He was working about two days before he got killed, then he was working.

Q On what kind of a job? A On a painting job.

40 Q Where? A At number 130 Columbia avenue.

Ignatz Friedman, cross.

Q How much was it for; was it a contract or day's labor? A He work by contract.

Q How much was the contract for? A It was the contract about fifty dollars job.

Q Was there anyone else working there with him at that time? A No, it was only himself.

Q Did he finish that job? A No; he did finish one room more and then he died and not finish it. 10

The Court. How many months was he at it?

The Witness. On the job?

The Court. Yes.

The Witness. Well, he was there about five or six days on the job, about five days.

Q How near did he have it done? A Well, he had one room to finish. 20

Q How many rooms were there? A There was about fourteen rooms.

Cross examination by Mr. Kalisch.

Q You say it was a contract? A Yes, sir.

Q Did he submit to you an estimate? A An estimate.

Q Yes. A On paper, a drawing.

Q Yes. A No, we just made verbal agreement. 30

Q Didn't he tell you in writing that he would do it for fifty dollars? A No, sir.

Q What was he to do for the fifty dollars? A Painting.

Q What kind of painting? A Green, yellow; all kinds of colors and the whole thing there.

Q What was he to paint? A Rooms.

Q How many rooms? A About fourteen rooms. 40

Ignatz Friedman, cross.

Q And he charged you fifty dollars to paint fourteen rooms? A Well, he had some paper work in it too.

Q What paper work did he have there? A The front rooms was papered.

10 Q Who did the papering? A Himself.

Q Who bought the paper? A Himself.

Q He bought the paper for you, did he? A Yes, sir.

Q That was included in that fifty dollars? A Yes, sir.

Q How about the paint, was he to supply the paint? A He supply everything.

Q Did he have men working with him? A Only himself.

20 Q You say he was there about four days? A He worked there about four or five days.

Q Four or five days? A Four or five days; I don't just remember exactly by the minute.

Q How much did the paper cost? A About a quarter a roll.

Q How many rolls did he use? A I could not tell you that.

30 Q Did he use more than ten rolls? A I don't know anything about how much is going in the room paper.

Q Do you know how much the paint cost which he used? A No, I don't know anything about that; I am a baker, not a painter.

Q Is that the only time Mr. Saper worked for you? A Many times. I know the man since the last eight or nine years he was working for me.

Lena Saper, cross.

DR. ROBERT R. ARMSTRONG, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q You are the county physician of the County of Passaic, are you not? A Yes, sir. 10

Q Do you remember the death of Louis Saper? A Yes, sir.

Q Did you examine his body? A I did.

Q Will you tell us where the injuries were?
A My records show that in this case I signed the death certificate as multiple injuries. This man apparently was injured internally and it was also presumed that he had a fracture of the skull.

Q Have you any recollection as to what marks, if any, there were upon his body? A I do not recall now. 20

No cross examination.

LENA SAPER, recalled as a witness on behalf of the plaintiff, for further cross examination, testifies as follows:

Cross examination by Mr. Kalisch.

Q Who did you work for at the time your father was living? A In a paint store. 30

Q Where? A On Monroe street.

Q What is the name? A The Manhattan Wall Paper House.

Q The Manhattan Wall Paper Company? A Yes, sir.

Q How much were you earning a week? A I earned then seven dollars.

Q Seven dollars a week? A Yes, sir. 40

Fannie Saper, direct.

Q How long had you been earning seven dollars a week? A About a year.

Q What did you do with that money? A I spent it.

10 Q Did you ever buy clothes with it? Did you spend it for your own clothes? A For clothes, for spending money, for everything.

Q You say your father was shorter than Mr. Ward is? A A little shorter.

Q Was he about as tall as I am? A I think a little taller than you are.

Q Between Mr. Ward and myself, is that the idea? A Yes, sir.

Mr. Kaisch. May I ask how tall you are, Mr. Ward?

20 *Mr. Ward.* About five feet nine.

Q And you say your father was shorter than Mr. Ward? A Yes, he was a little shorter than Mr. Ward.

Q How much shorter? A About an inch or two.

At the request of plaintiff's counsel, Samuel Bernstein was sworn as an interpreter.

30 FANNIE SAPER, sworn through the interpreter as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q You are the wife of Louis Saper? A Yes, sir.

Q Do you remember when your husband was killed? A Yes.

40 Q What was his business before that time? A He was a painter.

Fannie Saper, direct.

Q How long had he been in the painting business? A About eleven years in Passaic; he was painting for himself.

Q How many children have you? A One child.

Q You and your husband and daughter lived in the family? A Yes, sir. 10

Q How much rent did you pay? A Ten dollars a month.

Q How much did it cost you for heat, coal? A Ten dollars a month.

Q How much for lights? A About two dollars and a half.

Q How much for food for the three of you? A About thirty-five dollars a month; about twelve dollars a week altogether. 20

Q What did your husband do with the money he made? A He gave it to me.

Q What did you do with it? A I had to pay for the expenses for food, for coal, for gas and for spending money for us all and everything, also for clothes and what remained I saved.

Q I show you a bank book; whose bank book is that? A That is mine.

Q Where did you get the money that was put in there? A From my husband. 30

Mr. Ward. I offer the bank book in evidence.

Mr. Kalisch. I object to it. It is not the best evidence. It is hearsay and the mere fact that she put this money in the bank is no evidence of earning capacity; she says she got the money and saved some and paid the household expenses and clothing. 40

Fannie Saper, direct.

Mr. Ward. I will withhold the offer for the present.

Q Did you get any money from any other source except what your husband gave you?

10 A No. I did not keep any boarders or do anything else to get money and I did not get any money from anywheres else, because I am a weak woman and I cannot keep any boarders and I only get money from my husband. That is all.

Mr. Ward. Now I offer the book in evidence.

Mr. Kalisch. Objected to as not being the best evidence.

Objection overruled; defendant excepts.

20 Admitted and marked "Plaintiff's Exhibit P. 2," of this date.

Q The money that you put in this bank account, was that ever used by your husband in his business? A Never; no, sir.

Q What kind of a man was your husband?

A He was a good man, strong and also healthy and always jolly, and he always used to laugh at me because I was weak.

30 Q What about his health? A He was all right; he was always healthy; he never complained.

Q Aside from what you have told us about the food, the heat, the lights and the rent, was there any other way for your husband to spend money upon you or your daughter? A Yes,

40 sir; he used to spend for the synagogue and for societies. I have twenty receipts where he used to belong to societies and paid dues to the societies and also in the synagogue, offerings.

Fannie Saper, cross.

Q Who bought your daughter clothes? A I used to buy clothes for her. I always used to give her money to buy.

Q How much did your husband work on the average; how much of the time? A He used to work always, steady, with the exception of winter times, sometimes it was not steady. He was working for himself; he used to work winter times inside. 10

Q Do you know how much he made on the average?

Mr. Kalisch. I object to that. It must necessarily be hearsay.

The Court. She said he brought it home to her.

Mr. Kalisch. Yes, but that is not evidence of what he made. 20

The Court. You may ask her how much he brought home to her.

Q Do you know how much he brought home to you on the average? A Thirty dollars, sometimes thirty-five dollars a week. In the winter time—this time of the year—a little less. But always thirty dollars a week I would get all the year.

Cross examination by Mr. Kalisch. 30

Q Your husband always made thirty dollars a week? A Sure.

Q Winter and summer? A Summer he used to pay up for the winter, he used to make a little more in the summer time which would make up for the winter time; the winter time it stops, sometimes it slows down.

Q In the winter time he did not make thirty dollars a week, did he? A No; he used to 40

Fannie Saper, cross.

make more in the summer time and that brought it up to about thirty dollars.

Q How much would he make in the winter months? A It is not always the same. I cannot say.

10 Q About? A Sometimes in the winter time he used to make fifteen dollars or twenty dollars.

Q And sometimes ten dollars a week? A Any time when he stops, but not when he do the work; no, sir.

Q What do you mean, the time when he stopped? A When it was slow; when it slacked up.

Q Did he ever make ten dollars a week? A No, sir.

20 Q Do you mean to say that there were not some weeks when he did not make anything when the work was slow in the winter times? A Yes, sir, that happened sometimes, all the week; yes, sir.

Q How many weeks in the winter would that happen about? A May a month; about a month's time.

30 Q For maybe a month in every winter he would not make anything a week, is that right? A Yes, sir.

Q And then in the other winter months he would make maybe five or ten dollars a week? A Never.

Q Ten dollars a week in the other weeks? A No, sir.

40 Q How much would he make in the other winter months a week? A He always made enough for the living, not for to save, but for the living.

Fannie Saper, cross.

Q Can you state, in the winter months, outside of the month that you say he did not make anything in, how much he would make on the average about a week? A Twenty dollars, twenty-two dollars a week; sometimes he would make more, which would last over the winter. We always saved, every winter, and in the summer time he made more so it would overcome the winter months. 10

Q How much would he make during the winter months a week when he would make something? A Twenty or twenty-two dollars a week.

Q That was right through the winter months, always twenty or twenty-two dollars a week? A Yes, and what we were short we had it from the summer. 20

Q What do you mean by what we were short we had it from the summer? A Because we knew we did not have enough with twenty dollars a week, that is what I mean by that.

Q How many weeks would you get twenty dollars a week? A I cannot figure out how many weeks, when it comes before Easter it is busy already.

Q So that there were a good many weeks in the winter when he would not make twenty dollars a week and you expected the summer to make up for it? A Yes, sir, always so. 30

Q How long was your husband a painter? A In Passaic eleven years.

Q How long has he been in business? A He was a painter from Europe.

Q How long have you been living in Passaic? A Eleven years it will be this month.

Q Then you came to Passaic in 1906, is that right? A Yes, sir. 40

Fannie Saper, cross.

Q He was in the painting business in Passaic, was he? A Yes, sir, right away when he came there.

Q He did not have a store, did he? A No, sir.

10 Q I suppose he kept his office where he lived, did he? A In the house, yes, sir.

Q Was his business good since he started to work in Passaic? A Yes, sir, better yet than it is at the present time.

Q Better than it was later? A Yes, sir.

Q And he made a lot of money as soon as he came to Passaic, did he? A Yes, sir.

20 Q Of course, if he made a lot of money as soon as he came there he used to give you more money, didn't he? A Yes, sir.

Q How is it that this bank book in the Passaic Trust Company you only commenced to save in 1908? A From the start I had to furnish the house and I had to send to Europe some money. I had to send to my folks money; I received recently that I had sent money to Europe.

30 Q I understand you to say you have been sending money to Europe right along, have you? A Yes, from the first. Not now. Not lately. I cannot sent any money now. Six months ago I sent some money and just received the reply.

40 Q Why is it you waited till 1908 to start your savings if your husband was making so much money as soon as he came to Passaic in 1906; you waited two years? A Because we had to fix up a home; we had nothing when we came there; when we came from Europe we had nothing.

Fannie Saper, cross.

Q It did not take you two years to fix up your home in Passaic, did it? A Well, to furnish everything and also to dress and then we started right away to commence to send money to Europe.

Q You say you have been sending money up to six months ago to Europe, haven't you? A Since the war started I could not send. 10

Q That is the only thing kept you from sending money to Europe, the war? A Yes, sir; the last money I sent to Europe went around for two years time and came back, was returned.

Q You mean to say it took all your money from 1906 to 1908 to furnish your house in Passaic and that is the reason you did not make any deposit? A Yes, sir, at that time I did not care to save money because my intention was to go back to Europe. 20

Q And you decided to save after two years living in Passaic, is that so? A Sure.

Q Did you help your husband in business? A What could I help him?

Q Did your husband keep books? A No, sir; he was not a bookkeeper.

Q Did your daughter keep the books for him? A She only used to write out the bills. 30

Q Didn't he have a book where he entered the various jobs he worked in, to know when they would do those jobs and what work would be done on them? A He used to have a little diary in his pocket, a small book, in which he used to enter the number and the amount, how much he would take in on a job, and he would leave it with my daughter to make out the bills.

Q He used to enter in a small book how much the job was worth and told your daughter 40

Fannie Saper, cross.

to make out the bills, is that right? A He used to enter how much was the amount he was to get for the job and when he finished up he used to send out the bills and get the money.

Q Then he was not so uneducated that he could not write the amount he had in his book?

10 A He used to know a little Yiddish, Jewish.

Q Where is that book? A I don't know what became of it. He always used to carry it around in his pocket. A good many articles got lost from his pockets; I don't know what became of them. He had a bunch of keys with him and they got lost, about ten keys got lost.

Q Did you look for that book after he died?

A Yes, sir, we looked also for the keys and we could not find them.

20 Q How many rooms did you occupy at the time your husband was living? A Four rooms.

Q Above a store? A No, sir, in private.

Q What was it, a three family house? A No, sir; it was a six family house.

Q How many rooms do you occupy now? A Four; the same rooms.

Q Have you made any deposits in the bank since your husband's death?

30 *Mr. Ward.* Objected to as irrelevant and not proper cross examination.

The Court. How long does the book cover.

Mr. Kalisch. The book covers right down to date.

The Court. I will allow the question.

Plaintiff excepts.

A Ten dollars after his death.

40 Q Where did you get that ten dollars from?

Fannie Saper, cross.

Mr. Ward. Objected to as irrelevant and incompetent and not proper cross examination.

The Court. Referring to the ten dollars entered in the bank book?

Mr. Kalisch. Yes, sir. 10

The Court. I understood she testified that all the money she had deposited she had received from her husband.

Mr. Ward. Up to the time of his death. If this woman has received any money from any source whatever after his death that has nothing to do with this issue.

The Court. That is one way of testing the credibility of the previous evidence.

Mr. Ward. Obviously after her husband's death she could not have received money from him. 20

The Court. The counsel wants to find out whether she received any money from some other source.

Mr. Ward. She said she deposited ten dollars; now the source from which she derived that ten dollars is not proper cross examination and is not relevant. It gets us into a realm that is very far afield and that has nothing to do with this case. 30

The Court. Counsel has a right to test the statements of the witness as to this book.

Objection overruled; plaintiff excepts.

A I collected some money and I had it there before so I deposited it, the first time after my husband's death, for a while, I had quite some money yet. 40

Fannie Saper, cross.

Q Where did you collect the money from?

A From the landlords for whom he worked; they brought it themselves to me.

Q Was it money that your husband earned and which was due him? A Yes, sir.

10 Q Didn't you need money to live on? A Sure, I did. Nobody gave me to live for nothing.

Q Why did you put ten dollars in the bank? Why didn't you use it? A The first time, right after his death, I deposited it because I did not need it at that time and I did not need it yet. I don't like to carry too much money with me. I don't like to have in my possession too much money.

Q Where did you get so much money? A I have not got too much.

20 Q You say you did not like to carry so much money; where have you got so much money? A That what counsel sees in the book.

Q Nobody was earning any money after your husband died, were they? A Nobody; no, sir.

Q Why did you take this ten dollars and put it in the bank instead of using it for food?

A I did not curtail the expenses of the house, and I did not need it, so I deposited it.

30 Q Then you had plenty of money, did you?

A Yes, sir, I had enough money. You see I have no other resources, no other income from money, so I have got to keep back what I have got.

Q You have made some withdrawals in this book during the time that you had the money in the bank, haven't you? A Yes, sir, sometimes I did.

40 Q I see here in 1914, October 27th, you drew out three hundred dollars? A Yes, sir.

Fannie Saper, re-direct.

Q What did you draw out so much money for? A That time there was a strike in the banks in New York and I was afraid to keep it and I got the money at home on my own person and after I deposited it again.

Q Do you mean to say you drew out all the money you had in the Passaic bank for fear of the strike in Passaic? A Not all the money out, I did not draw all the money out. 10

Q Then here on October eleventh, 1915, you drew out a hundred dollars; what did you draw that out for? A I was going to buy a piano for my daughter. The money was deposited by Weinberger, and I found the piano was a used piano and the man who owned the piano could make trouble for me, then Mr. Weinberger told me I was boss of the money and I could take the money back again. 20

Re-direct examination by Mr. Ward.

Q When Mr. Weinberger gave you this hundred dollars back that counsel has referred to, you drew it out on October eleventh? A Yes, sir.

Q And did you after that on the thirteenth day of October, two days later, make a deposit of a sum, a hundred and fifteen dollars and was that the same money with something added to it, or not? A Yes, sir, I added money to that hundred dollars and deposited it. 30

Q On July thirteenth, 1916, you drew out a hundred dollars, what was that for? A I loaned it to a man, he asked me to loan him money.

Q Counsel has referred to your drawing out three hundred dollars on October twenty-seventh, 1914, you say that you took that money out be- 40

Fannie Saper, re-cross.

cause of a strike in New York? A Yes, sir, I kept it on my person.

Q On November twelfth I see you put back in the bank two hundred and sixty dollars, was that a part of the three hundred dollars or not?

A The same money, yes, sir.

10 Q What became of the forty dollars difference? A I was afraid to redeposit it in a lump sum, the three hundred dollars.

Q You say that you have collected some money since your husband's death, what is that money that you have collected? From what is it? From what has it come? A From his work.

Q What work? A Painting work and papering.

20 Q Of your husband's? A Yes, sir.

Q Before he died? A Yes, sir.

Q Have you any other money or income except the money that you still have to collect from your husband's work and this money in the bank?

Mr. Kalisch. Objected to as immaterial and irrelevant.

30 Objection overruled; defendant excepts.

A Nowheres else excepting from my husband.

Re-cross examination by Mr. Kalisch.

Q Does not your daughter work now? A Yes, sir, and she brings her money and uses what she needs.

Q She brings home some money, doesn't she? A She brings home some money and what she needs she uses.

Harry Raschbaum, direct—cross.

HARRY RASCHBAUM, sworn as a witness
on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q Did you know Mr. Saper in his lifetime?

A Yes, he worked for me.

Q How long did you know him? A I know 10
him about ten years.

Q Do you know what business he was in?

A Yes, sir, he worked as a painter.

Q Has he ever done work for you? A Yes,
sir.

Q How often? A A half year before he
died he has worked about sixty-four dollars
working for me.

Q What was it? A Rooms, painting and
plastering.

Q How many? A I got about ten rooms. 20

Q How long did it take him to do that, do
you know, how many months? A About a week.

Q How often did you see him? How many
times did you see him? A I see him every
week, every day, two times a week.

Q What kind of a man was he with reference
to his health? A He is a strong man.

Cross examination by Mr. Kalisch.

Q You say he did this job for you about six
months before this accident? 30

Q And it took him about a week to do the
job, you say? A About a week's time.

Q How much did you pay him for the job?
A Sixty-four dollars.

Q Did he have to supply you with any paper?
A Paper and painting.

Q How many rooms had paper? A Paper
got about four rooms. 40

Joseph Zentner, direct.

Q And he supplied the paper? A Yes, sir.

Q Did he have any man with him, anybody to help him? A No, he work himself; sometimes he take a man to work with him to help him.

10 Q Did he have a man to help him with your job? A Yes, he work for him painting, he worked himself and paper he got a man working for him.

Q How many days was the paper man there?

A Two days, three days, sometimes.

JOSEPH ZENTNER, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

20 Q You live in Passaic? A Yes, sir.

Q Did you know Mr. Saper in his lifetime?

A Yes, he lived in my house.

Q What kind of a man was he? A A good, strong man.

Q Do you know what business he was in? A In the painting business.

Q How well did you know him, how often did you see him? A Oh, I see him every day, because I come in the house, he lives in my house.

30 Q Do you know whether or not he had steady employment, had steady work? A I know when I need him sometimes I can never find him home.

Q Did he ever do any work for you? A Oh, all the work.

Q All the work? A Yes, I got ten houses.

Q And he did all of your work, did he? A Yes, sir.

40 Q How? A I gave him the jobs and he make it up and when the first comes I pay him.

Joseph Zentner, cross.

Q Did you give it by piece work or by day's labor? A No, just I show him that job and something need that house where he lived, was the painting, and I told him how much and he told me a hundred and seventy-five dollars and I says "Go on."

Q When was that hundred and seventy-five dollar job? A Oh, it was three years before. 10

Cross examination by Mr. Kalisch.

Q You say Saper did all the painting work for you? A Yes, sir.

Q Right up to the time of this accident, didn't he? A Yes, sir.

Q Did you have quite some work for him to do? A Yes, I suppose when a man has got houses he got enough work. 20

Q One bill, you say, you paid him a hundred and seventy-five dollars? A Yes, that was a house, fourteen and sixteen, a double house, I have to paint it that time.

Q How long ago was that? A Three years ago.

Q Has he done any big jobs, say six months from the time he died? A Rooms, he make for me, because I know when I come for the rent I got to give him all the time to the rent fifty dollars, sometimes forty dollars, to the rent. 30

Q Have you got any receipted bills for the work he did? A If you tried, I don't keep receipts, only I collect cash and I pay cash.

Q When a man does work for you he sends you a bill? A Yes, he sends me a bill.

Q And when you pay you get a receipt? A Yes, sometimes.

Q Didn't you get a receipt from Saper usually when you paid for his work? A I never 40

Alice Saalbach, direct.

ask for a receipt, because I know he is satisfied if I pay one time.

Q You business men want receipts usually to show that you have paid the money? A Yes, anybody I don't know.

10 Q He was one man you let go? A Sure, I believe him.

Q He was one man you let go, of all the people you done business with, you would not want receipts from him? A One man, yes, sir.

Q How long have you known Mr. Saper? A When I built the house I found he lived there when they finished the house he moved there and since that time he lived there.

Q Did you pay your bills by checks? A Sometimes I gave him checks.

20 Q Have you got your receipted checks? A From who?

Q The receipted checks? The checks showing that you paid? Have you got them? A I have got some home.

Q Can you bring them here? A I will try to find them.

Q Can you bring them here with you? A Yes, sir.

30 Q You say this was a six family house in Passaic? A Yes, a double house.

ALICE SAALBACH, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live? A Jefferson street, number sixty-eight.

40 Q Do you remember the day this accident happened? A I think it was the fourth of November, I think so.

Alice Saalbach, direct.

Q You remember the accident? A I came after it was happened.

Q Whereabouts were you at the time this accident happened? A I was about the length of this room, I think so.

Q Do you know which way Jefferson street runs? A Yes, sir. 10

Q How does it run? A Jefferson street, the automobile came from Dundee and was going to Main avenue.

Mr. Ward. I think we agree that it runs east and west, does it not?

Mr. Kalisch. Yes.

Q Jefferson street runs east and west? A Yes. I can better tell you when you say right and left. 20

Q Do you know where Hope avenue is? A Yes, sir.

Q Hope avenue crosses Jefferson street, doesn't it, at right angles? A Yes, sir.

Q Dundee is down that way to the east, is it not? A Dundee crosses the same way as Hope avenue, that is the same way.

Q You mean Second street? A Second street, yes.

Q And you say the automobile came from— 30
A From Second street.

Q Which side of Jefferson street were you in? A On the right side.

Q Going in which direction? A Toward Main avenue.

Q Going towards Main avenue? A Yes, sir.

Q Had you reached Hope avenue yet? A No, sir.

Q How far were you from Hope avenue? A Well, I think it was about— 40

Alice Saalbach, direct.

Q About how many feet? A Where the automobile stood was about forty-five feet.

Q Where were you? A About half of the block between First street and Hope avenue.

Q Do you know where the store is there? A Yes, sir.

10 Q How far were you from that store? A I was about half, on the other side.

Q What is there on the corner of Hope avenue and Jefferson street? A An empty lot.

Q Next to that what is there? A A four-family house.

Q Is there any store there? A No, sir.

Q Next to the three-family house? A Nothing more, then the mill.

20 Q How far were you from the corner of Jefferson street and Hope avenue about? A About half of the block.

Q Can you tell us in feet? A No, I never measured it.

Q Can you point to any place in the room here to show us? A I think it is farther than this room is long, I think about the length and a half.

Q What time was it? A About six o'clock, two or three minutes before six.

30 Q Did you see the automobile pass you?

Mr. Kalisch. Objected to as leading.

Objection overruled; defendant excepts.

A I saw the automobile pass me; yes, sir.

Q How was it going? A Oh, every automobile goes quick; they go never slow.

Q And after it passed you did you hear anything? A No, sir.

40 Q Was there any signal given or any warning of any kind? A No, sir.

Alice Saalbach, direct.

Q Then what was the next thing you noticed? A The next thing I noticed I was look at the man in the mud gutter; I saw the man there.

Q You kept on walking up the street towards Hope avenue? A Yes, sir.

Q How near were you to the man when you saw him in the mud gutter? A I was just between the man and the automobile. 10

Q Where was the automobile? A About twenty feet further than the man.

Q Twenty feet past the man? A Past the man.

Q Then you noticed the man lying there? A I saw the man lying there.

Q The automobile, was that going, or had it stopped? A It stopped. 20

Q Whereabouts was the man; how near to the gutter? A About with his feet three or four feet from the gutter; no further.

Q Did you notice anything else there? I mean, beside the man in the gutter? A I saw the lady in the automobile come out of the automobile and look at the man and go back again and get a blanket, and after getting the blanket she went to the store to telephone.

Q What else was there there, if anything, beside the man and the automobile and the lady? Was there anything else there in the street? A There was a girl about sixteen years old and she said "Oh, my, the poor man is killed." 30

Q Did you see anything else there? A Not that I can remember; no.

Q Did you see any wheelbarrow there? A Yes, I saw the wheelbarrow there, all in pieces.

Mr. Kalisch. I object to that as leading. 40
Objection overruled; defendant excepts.

Alice Saalbach, cross.

The Witness. I saw the wood of a wheelbarrow all in pieces that laid down about seven or eight feet from the man off.

Q Away from the man? A Yes, sir.

Q You know what the headlights of an automobile are, don't you? A Yes, I know that.

10

Q When the automobile was standing there did you see any lights from the headlights? A I cannot tell you that. You see, I was not so near the automobile when I was there. I was looking at the man. I was see the man down there.

Q As this automobile passed you did you notice any lights from the automobile? A No, I did not notice anything like this; no, sir.

20

Q When you were walking up the street talking to your friend there, could you or not see across the street? A Yes, when I was looking I could see; I saw there, but we were busy talking and I did not notice anything.

Cross examination by Mr. Kalisch.

Q Where do you live? A Number 68 Jefferson street, Passaic.

Q Did you live in Jefferson street, Passaic, on the first of November? A Yes, sir.

30

Q Are you employed? A What do you mean?

Q Do you work? A Yes, sir.

Q Where do you work? A In the McLean Mill.

Q Where is that mill? A On Third street.

Q Passaic? A In Passaic; yes, sir.

Q What kind of a mill is that? A In the weaving shop, and finishing and everything.

Q Were you working in the McLean mill on the first of November? A Yes, sir.

40

Alice Saalbach, cross.

Q What are the hours in that mill; what time do you quit work there? A In the morning we go to work at seven o'clock till twelve o'clock and then twenty minutes to one to twenty minutes to six.

Q But when you quit work that day in the afternoon, it was dark, wasn't it; November? 10

A I cannot remember—dark—November is always this time, November and December, it is always generally dark, and it might have been a little bit foggy.

Q It was foggy, was it? A I think so.

Q It was dark, wasn't it? A I cannot tell you that.

Q Don't you know whether the lights were lit in the street or not? A Certainly the lights were lit in the street.

Q Jefferson street is a pretty long street, is it not? A Not very long. 20

Q Is it not quite a long street, now? A About four or five blocks, that is all.

Q That is a pretty long street, is it not?

The Court. Well, it is four or five blocks, whether it is long or short.

Q You were walking home, were you? A Yes, sir.

Q And, as you were walking home you came toward Hope avenue, did you? A Yes, sir. 30

Q Before you crossed Hope avenue did this automobile pass you? A Before I crossed Hope avenue, no.

Q After you crossed Hope avenue? A Oh, yes, it passed me before I got to Hope avenue, yes.

Q How long before you got to Hope avenue did the automobile pass you? A I think I told you about the room length and a half more. 40

Alice Saalbach, cross.

Q You mean this way across? A About that.

Q About the length of this room and half again? A I think so, from the corner.

It is agreed between counsel that the length of the room is about sixty feet.

10

Q Then you say half again? A Yes, sir.

Q That is ninety feet then? A I think so.

Q Then the automobile passed you when you were ninety feet away from the corner of Hope avenue and Jefferson street? A About ninety feet.

Q And you did not notice whether this automobile had any lights on it or not, did you? A I don't remember, I did not notice it.

20 Q You won't say it did not have any? A I cannot say that.

Q You don't know? A No, sir.

Q And the next thing you know is you saw the man lying in the street? A In the road.

Q That is the next thing you know? A Yes, sir.

Q You did not see the accident did you? A I did not see the accident, no.

30 Q How far in from Hope avenue was the man lying? A There was an empty lot and then the four-family house and then there was the automobile and then twenty feet.

Q About a hundred and twenty feet? A I don't know the feet.

It is agreed between counsel that the distance indicated by the witness is ninety feet.

Q From where that man was lying can you tell me how far it was to the next corner? A
40 What do you mean?

Alice Saalbach, cross.

Q As you were facing, how far away is the the next corner?

The Court. You mean Hope avenue?

Q How long was the block? A What is the distance.

The Court. What is the next street east of Hope avenue. 10

Mr. Kalisch. First street.

Q Is that the next street beyond Hope avenue? A Yes, sir

Q How far was First street from where this man was lying, about? A I cannot tell you.

Q Can you point out the distance in this room? A I know how much it was from one corner to the other not much further, he was more to Hope avenue, much further there. 20

Q Was First avenue a good deal further down? A Yes, a good deal further down than Hope avenue, much more.

Q When the automobile passed you before you got to Hope avenue, how did you know the automobile was passing you? A I heard it, I saw the automobile pass me.

Q You did not hear the horn blow? A The horn did not blow. 30

Q Eh? A No.

Q You mean you did not hear it? A The horn did not blow.

Q A moment ago didn't you just say "I heard" and then you stopped, did you mean to say you heard the horn of the automobile? A I did not hear the horn of the automobile, the horn was not blowing.

Q When it passed you? A Sure, it passed me and it did not blow. 40

Alice Saalbach, cross.

Q You were up to where this man was lying?

A Pretty near. I was twenty, twenty-five or thirty walking, then I saw the man, when he was down, you know what I mean, when it was happened I was about twenty-five or thirty feet from the man.

10 Q You were walking the same way the automobile was going? A Yes, sir.

Q Of course, the automobile got across Hope avenue, over Hope avenue before you got to Hope avenue? A He was not to Hope avenue yet, he passed us before we got to Hope avenue.

The Court. Neither one of you got as far as Hope avenue?

20 *The Witness.* Yes, sir, the automobile was by the four-family house when it was stopped.

Q Then the automobile did not get to Hope avenue? A No, sir.

Q It got about ninety feet away from Hope avenue when the accident happened? A I think so, yes, sir.

Q When you got there the accident had already happened? A Yes, sir.

30 Q What did you see? A I see the man lay on the ground.

Q Was he lying in the middle of the street? A He was laying about three or four feet from the mudgutter in the road, he laid with his face on the ground.

Q And you say there was a fog? A I say in November and December there is always a little fog, always in that time of the year.

40 Q Was there a fog there that very night? A Not so very, no, sir.

Alice Saalbach, re-direct—re-cross.

Q It was dark, wasn't it? A It was not so dark, I cannot say that, six o'clock it is always enough light.

Q The street lights were lit weren't they? A The street lights were lit.

Q Can you tell how far away you were from where this man was lying when the automobile passed you. A I think it was about twenty-five or thirty feet. 10

Q Twenty-five or thirty feet? A Yes, sir.

Q That is the distance you were away from the man when the automobile passed you? A I think so.

Q Between twenty-five and thirty feet? A Yes. That is what I think.

Re-direct examination by Mr. Ward. 20

Q Is there any light there on the corner of Hope avenue? A Certainly, there is a big light.

Q Will you just tell the Court and Jury where that light is? A The light is not more than, I think, three or four feet from the corner.

Q Three or four feet from the corner of Hope avenue and Jefferson street? A Yes, sir.

Q What kind of a light is that? A A big light. A big light with a big globe. 30

Re-cross examination by Mr. Kalisch.

Q That is the first time you saw this man when he was lying in the street, wasn't it? A Yes, sir.

Q You did not see him before? A No, sir.

Mary Thompson, direct.

By Mr. Ward.

Q Before that and when the automobile passed you, what were you doing? A I was talking with another lady.

Q With your friend? A Yes, sir.

- 10 MARY THOMPSON, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live? A Number two hundred and five Randolph street, Passaic.

Q Were you with Miss Saalbach, the last witness, at the time this accident happened? A Yes, sir.

- 20 Q Will you tell us where you were on the—
The Court. Going towards Hope avenue.

Q You were on the northerly side of Jefferson street? A I was on the right side of Hope avenue and going towards Hope avenue; I was walking on the inside and Miss Saalbach was on the outside.

- 30 Q Did you see the automobile after it struck the man or not? A The automobile passed us and we were between the automobile and the man. The automobile was here, we were there, and the man was lying down there, maybe about twenty or twenty-five feet away from the automobile, he laid out in the road, and way over here a girl was saying: "Mrs., a man was struck with an automobile."

- 40 Q When the automobile passed you, how far were you from the corner at that time? A May be thirty or forty feet, I could not exactly say how far; I think from the corner may be about thirty or forty feet.

Mary Thompson, direct.

Q After it passed you did you keep on walking or not? A Well, we kept on walking until the girl spoke.

Q Then when you kept on walking what was the next thing you saw or noticed? A Well, when the girl told us we turned around and seen the man lying in the road. 10

Q Who was that girl, do you know? A That I don't know, she was a little girl about fifteen or sixteen years old.

Q Then you turned back? A Yes, sir.

Q And you saw the man lying in the road? A Yes, sir, we saw the man lying in the road, about three or four feet from the gutter.

Q Was there anything else lying there? A I think when I was standing there, I seen pieces of wood lying around; I think I saw them, and I thought when I seen him there that he was a man worked on the building there and he had a bundle of wood coming home and that is why I thought it was wood. 20

Q But you did see wood there? A I seen wood lying in the gutter; I did not know whether it belonged to the man or not, that I could not say now.

Q How far away from where the man was lying was the automobile? A About twenty-five feet, I guess. 30

Q Towards Hope avenue? A Towards Hope avenue.

Q Before this accident happened did you hear the automobile give any signal or blow any horn or anything of that kind? A No, sir; I never heard the car give a signal.

Q As the automobile passed you did you notice any headlights? A No, sir, we did not notice the automobile passing us at all, we were 40

Mary Thompson, direct.

talking and never noticed the automobile passing us until the girl spoke.

Q That is, you did not? A No, sir.

Mr. Kalisch. She testified, "We never noticed it."

10 *Mr. Ward.* Can she testify as to whether the other witness noticed it or not?

Q Did you or not notice the automobile as it passed you, when you were walking along, and when the automobile passed you did you notice it, did you see it? A I might have seen it but I did not take no notice to it.

20 Q After it passed you, when it was standing in the position you have described towards Hope avenue about twenty-five feet away from this man, did you notice any headlights lit on it then? A No, sir, I did not notice any lights.

Q Were there any bright lights there that you saw? A I did not notice any.

Q Or any rays of lights projecting out from that automobile? A No, sir, none in the back of the automobile.

Q Was there an electric light there or not? A Well, that I could not say.

30 Q Do you know whether there was any light there on that corner? A That I could not say, I don't know anything about that corner.

Q About what time was it? A About six o'clock, about a few minutes to six.

Q Coming up the street could you see across the street or not before this accident happened? A Well, guess I could, if you went to look, but we were not looking over the street, we were talking and going home to our supper.

Mary Thompson, cross.

By a Juror.

Q Was it dark at that time? A Well, I don't know whether it was dark. I could see the man laid in the street. I don't know whether it was darker that night than any other night. I could see the man right there in the street.

10

The Court. When you were how far away?

The Witness. When we went back a few steps we saw.

The Court. Show us in this room how far could you see the man in the street?

The Witness. The man was lying about as far as that second chair, when the girl told us.

The Witness. (Indicating.) Here is the first and there by the table, that is the second.

20

The counsel agree that the distance indicated by the witness is about fifteen feet.

The Witness. The girl says he was lying in the road and we went to the gutter and seen the man lying in the road. Of course we did not go straight in back of the automobile, we went down.

30

Cross examination by Mr. Kalisch.

Q You were with this tall lady? A Yes, her and I were coming home from work.

Q What time was it? A A few minutes to six.

Q Now, you can answer the question the juror asked you, whether it was light or dark. You know whether it is night time or day time?

A Of course, it was night, it was not daylight.

40

Mary Thompson, cross.

it was night, it was six in the evening and it was night.

Q The lights were lit, weren't they, on the street? A The lights were lit in the street.

Q It was dark, wasn't it? A Yes, sir, it was dark, it was not daylight, it was dark, six o'clock in the evening.

Q It was dark and the lights were lit in the street? A The lights were lit in the street, yes, sir.

Q You were just coming home from work and walking along in conversation together? A We were having a conversation, and we did not hear anything and did not see anything until this girl drew our attention and we went back to see where the man was killed with the automobile and seen the man in the road.

Q You did not see the accident? A No, sir.

Q When you came up to where the man laid, he was lying in the road? A He was lying in the road, about three feet from the gutter.

Q You don't know whether there were any lights burning on the automobile or not, do you? A I did not see any.

Q Do you mean to tell this jury there were no headlights burning? A I was in the back of the automobile.

Q Was the back light burning? A I could not say. I guess it was.

Q You were there.

The Court. She has said she could not say.

Q Can't you tell this jury whether the back light was burning? A Of course, I did not notice the automobile until we went down to see

Mary Thompson, cross.

the man, then I turned back and the automobile was standing and there was not anybody in it.

Q Do you mean to say that you cannot tell this jury whether that light was burning or not? If you don't know, say so? A I don't know.

Q You don't know whether the headlights were burning or not, do you? A I don't know. 10

Q You did not see them? A I did not see them at all, I was in the back of the car.

Q You say you turned back to look at the man lying in the road? A When we went to the place? Of course, we were between the automobile and the man when the girl told us and we had to turn back to see the man in the road, that is the way.

Q How many steps did you have to walk back? A I could not say, we went this way 20 (indicating) across that way.

The Court. About how many steps?

The Witness. May be about ten steps. Ten steps down this way and then we had to go from there straight over to the gutter to see where the man was lying.

Q You did not see this man before this accident happened did you? A No, sir.

Q This accident happened behind you then didn't it? A It happened behind me? 30

Q Yes? A I don't know whether it happened, because I did not know anything about it till the girl told us.

Q If you had to turn back the accident must have happened behind you; isn't that right? A Yes, it must have.

Q And this lady who was on the stand before you she was with you all the time, wasn't she?

A Yes, she was with me. 40

Morris Abbott, direct.

Re-direct examination by Mr. Ward.

Q When this girl said something to you was the automobile in front of you or in the back of you? A It was in the front of me.

10 Q Towards Hope avenue? A Towards Hope avenue, yes, sir.

Q And when this girl said this, you just turned around? A Yes, sir.

Q And the man was in the back of you, is that right? A The man was in the back of me.

Q That is, back of you, towards First street? A Towards the Dundee direction.

Q That would be First street. A Yes, sir.

20 The Court then adjourned for the day until tomorrow, March eighth, 1917, at 10:00 o'clock A. M.

SECOND DAY.

Paterson, N. J., March 8th, 1917.

The trial was continued this day pursuant to adjournment.

30 MORRIS ABBOTT, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live? A Number fifty-nine Jefferson street; I was before living number fifty-seven when this case happened.

Q Were you living there the first of November last? A Yes, sir, I moved on the fifteenth of December.

40 Q What is your business? A Grocery.

Morris Abbott, direct.

Q Where was your store? A Number fifty-seven Jefferson street, on the corner.

Q At that time? A Yes, sir.

Q Did you see this accident? A No, I did not.

Q What was the first that you knew about it?

A One lady came down and asked me if I have a telephone. 10

Q Did you hear about the accident? A Yes, sir.

Q What did you do then? A Then we looked out to the street to see what had happened, so we came down and we see the man lying there near the gutter and he was living yet, I cannot judge whether he was living or whether he was dead yet, I could not tell that.

Q Did you see the automobile? A Yes, sir, I see it when I come out. 20

Q Do you know what the headlights of an automobile are, those large lights? A I did not see no lights then because I came out after, so it may be it was put out or may be it was not, I cannot tell that.

Q When you came out were they lit or not? A No, there was no lights, I did not see no lights lit then.

Q On which side of the street was the man lying? A On the other side of the street from my store, on the other side. 30

Q That would be across the street from your store? A Yes, sir.

Q Your store is on the south side, is it not? A Yes, sir.

Q When you came out of your store, could you or not see the man lying there across the street? A When you stay right opposite you could see it, because it is not dark, it is light. 40

Morris Abbott, cross.

Q It was partially light, wasn't it? A Only in a while it was light. You could see it from my side to the other side, if you stand this side of the sidewalk you can see what is going on on the other sidewalk if you want to see.

Cross examination by Mr. Kalisch.

10

Q Have you been living a long time on Jefferson street? A Yes, sir, I am living there eleven years.

Q You say you did not see this accident? A No, I did not, I did not see how it happened.

Q It was dark when this accident happened wasn't it, around six o'clock, wasn't it? A Yes, it was around six o'clock, but it ain't dark then, the street is light there.

20

Q The street lights were lit in the street? A Sure the street was lit.

Q It was dark, wasn't it? It was night time wasn't it? A It was getting dark. Of course, it was not dark, but it was getting dark, you would not need no lights if it was not getting dark.

30

Q It was dark enough so that they had to have the lights lit in the street? A Of course, that is ruled by the city if they need the lights they put them out, I cannot tell if it was in the day or the night.

Q What time was it about? A I think before six.

Q How much before six? A I cannot tell you exactly.

Q Do you remember what month it was? A Yes, it was November.

40

Q It is pretty dark around six o'clock in November? A It might be so, I cannot judge such things, because, how can I tell. Every-

Morris Abbott, cross.

body knows when it is not evening it is dark. We were a little busy and there was nobody in the store when this lady came over, the clerk was with me then and we were just standing there.

Q Were the lights lit in your store? A. Yes, sir. 10

Q What kind of a store have you got? A A grocery store.

Q When did you light the lights in your store? A It was becoming dark I had to light it.

Q How soon before you heard of this accident did you light the lights in your store? A I could not tell you.

Q Give us some idea? A It may be five minutes, it may be ten minutes, I cannot tell exactly. 20

Q It may be a half an hour? A May be it was, sometimes we light the lights before we need it.

Q Have you electric lights or gas lights? A We have gas light, a big light.

The Court. Did you see anything else on the street besides the man?

The Witness. I see a little coal, and knew he was picking coal with his wheelbarrow, he was carrying coal. 30

Mr. Kalisch. I move to strike out the last part of the answer.

Motion granted.

Q (*By Mr. Kalisch.*) You say you saw coal there? A Yes, sir.

Q When you came out the man was in the street? A He was near the gutter lay. 40

Morris Abbott, cross.

Q How near, can you say? A I cannot judge this at all, I don't know, he was near the gutter like his head was on the street slanting and the feet was like to the gutter.

Q To the curb, was it not? A Yes, sir.

10 Q And it was in the middle of the block, wasn't it? A Not exactly, it was near to Cavanaugh's house.

Q How near is Hope avenue from where he was lying to the corner? A You mean how many feet?

Q Yes, feet or point to the distance in the room? A It was from their house, you know where Cavanaugh's house is across the street from my store? This was from there further. I cannot tell how many feet.

20 Q Can you say how many feet from the corner of Hope avenue the man was lying? A It might be such a distance from there to there (indicating).

The Court. It might be of interest to the counsel to know that a court officer measured the room this morning and found that it was fifty-nine feet long and forty-six and a half feet wide.

30 Q How far? Just point to the distance in this room, about where was the man lying from the corner of Hope avenue and Jefferson street? If you cannot give it to us in feet point it out to us in this room? A Well, I guess the size from the corner of the room, like from this side to the other side, I should judge.

Q The width of this room? A The width of this room, yes, from the corner.

40 *Mr. Ward.* Fifty-nine feet?

Morris Abbott, cross.

The Witness. I cannot tell so close, maybe it was less or more, one foot.

Q This is a pretty well paved street? A It is a paved street.

Q What is it paved with? A Little stones.

Q Small stones and dirt? A Yes. It is not asphalt. 10

Q It is a smooth pavement, is it not? A Yes. Not very long ago it was fixed. They are fixing it all the time.

Q At the time of the accident it was a pretty smooth pavement, wasn't it? A Yes, it was fixed. The street was all right.

Q How far away from where your store is was this man lying? Do you know? Did you have to walk up to the man? A Yes. On the other side. My store is on this side here. 20

Q How far away about? A I am just telling you, on the other side is the house, Cavanagh's house, from this store right across and he was laying further from the house yet, a little bit further.

Q Just point to something in the room? A Maybe like this table would be there Cavanagh's house, and further on there, you know where Cavanagh's house is I am talking about cross the street from this house, he was there further on just like this here, that much (indicating.) 30

Q Was he thirty feet away from where the store was? A How many feet that people got, just about that much, how many feet that people by the table got between them.

Q The distance of this table? A Yes, how many feet that table takes there.

Q You say the distance from this table? A No, just how many feet the table got. 40

Morris Abbott, re-direct.

Q The distance of this table, and how much more? A Just about that much from the house.

It is agreed between counsel that the distance indicated by the witness is about eleven feet.

10 Q You did not see the man lying there from your store, did you? A Well, if I go out from there I can see it, I did not think to see anything, I did not see till I came over to him.

Q When you came out of your store you did not see the man lying in the road, did you? A No, sir.

Q And you did not see him until you came up to him? A I can see somebody. I don't have to go so close to touch him. I can see, not
20 in his face, I can see while he is laying there, yes.

Q From your store? A Yes, I want to go. I can see something laying there, but I cannot tell what it was.

Q When you came out of your store, before you walked any at all— A I was tell someone was run over.

Q —did you see something? A I can see something, yes, but I cannot tell much what it
30 was, I see the wheelbarrow there too, I see that.

Re-direct examination by Mr. Ward.

Q The lights from your store, have you ever noticed how far they reflect out in the street? A The lights were always strong, going over all that stoop there what is across the street.

Q Is there any light there in the street, any arc light? A There is a light in between the light on this corner where I was and a light by
40 the other street and there is no light in between.

Morris Abbott, re-cross.

Q Is there any arc light, an electric light.
A On the corner there is an electric light, sure.

Q Something has been said about its being foggy, was there any fog that night? A No, I don't remember any fog at all.

Re-cross examination by Mr. Kalisch.

Q You saw no lights on the machine? Do you say there were no lights on the machine?

A When I came out there was no lights.

Q How do you know there were not? A I did not see none. The machine was stopped, so I did not see none. The machine was stopped, so I did not see no lights.

Q Did you look for lights? A I came up and the automobile was dark.

Q Did you look for lights on the machine?
A I did not look for any lights, no.

Q Why did you make the statement that there were no lights on the machine? A Because it did not have none to see. There was no lights, I could not see, that is all. If you come up to see, if I have to come to this car I would see. I did not see those lights, I did not see any lights, but I was not interested to see.

Q Then you were not interested to see if there were any lights or not? A No, sir.

Q So you don't know? A I know there was no lights, but I don't say the automobile did not have lights when he was driving because I don't know that. I can only say the automobile did not have lights when it was standing; that is all I can swear to, but this I know, this I can swear to.

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Harry Pruzansky, direct.

HARRY PRUZANSKY, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

- Q What is your business? A I am in the plumbing business.
- 10 Q Whereabouts were you engaged in that business on November first, 1916? A In Ninth street, Passaic.
- Q What time did you get through on the first of November? A A little after five o'clock.
- Q Were you on Jefferson street? A Yes, sir.
- Q Did you or not see this accident? A Yes, sir.
- Q Jefferson street runs east and west, does it not? A Yes, sir.
- 20 Q Out towards Main avenue in Passaic and down towards Dundee? A Yes, sir.
- Q Do you know where Hope avenue is? A Yes, sir.
- Q Whereabouts were you on Jefferson street when this accident happened? A I was about a hundred and fifty feet away from the corner of Hope avenue.
- 30 *The Court.* Which way were you going?
- The Witness.* I was going towards Hope avenue.
- The Court.* Were you on the right hand side of the street or the left?
- The Witness.* Yes sir; I was on the right hand side.
- Q Was that or not the same side as where these women were? A Yes, sir.
- 40 Q Did you have anything with you? A I had my wheel with me.

Harry Pruzansky, direct.

Q Were you riding or walking? A I was riding and the cop took me off because I had no light on it; he told me to get off my wheel and I walked with the wheel on the side.

Q Did you notice the automobile? A Yes, sir; I noticed it when it passed me.

Q Did you notice any lights? Do you know 10 whether or not there were any lights on it? A No, sir; I did not see any lights on it.

Q After it passed you will you tell us what happened? A Well, I was walking.

Q Just from that time on when the automobile passed you? A When the automobile passed me I seen it when it went into the man and the man was wheeling a wheelbarrow.

Q Whereabouts was the man wheeling his wheelbarrow? A He was going on the right 20 hand side too.

Q In which direction was he going? A He was going on the right side, but he was going towards Hope avenue with that wheelbarrow.

Q How far was he from Hope avenue? A I should judge he was about sixty-five feet; something like that, because there is a corner lot there and there is a house there and he was just about the corner of the house then, the corner of the house. 30

Q How far out from the curb was he? A About five feet, four or five feet.

Q When you were a hundred and fifty feet from that corner there. and the man was about sixty or sixty-five feet from the corner, going along; could you see the man or not at that time?

A Yes, sir; I seen the man going, because he had white overalls on him.

Q White overalls? A Yes, sir.

Q And you saw that did you? A Yes, sir. 40

Harry Pruzansky, direct.

Q When this automobile passed you, what side of the road was that on? A The automobile?

Q Yes. A He was on the right side, too.

Q Did it give any warning? A No, sir; I did not hear any.

10 Q When it struck the man, what part of the man did the automobile strike?

Mr. Kalisch. Objected to.

Objection overruled; defendant excepts.

A The front.

Q What part of the man? A Well, of course, I could not see just—what do you mean? I cannot understand you.

Q What part of the automobile hit the man?

A The front part.

20 Q The front part of the automobile? A Yes, sir.

Q How was the man going when it struck him? A Well, it hit him in the back.

Q What time was it, as near as you can fix it? A About five minutes to six.

Q How do you fix that time? How do you know it was about that time? A Well, because after a little distance the bells rang six o'clock.

30 Q Whereabouts were you working that day?

A I was working on Ninth street that day, Pas-saic.

Q What time did you stop working? A I worked until about twenty-five minutes after five, something like that. I was inside, just putting up sinks, so we had to finish; we always quit at half past four or five o'clock and I was inside working and I had to finish up the sinks.

40 Q After you quit, where did you go? What did you do before you saw the accident at this

Harry Pruzansky, direct.

time? A Well, there was me and another fellow with me, and we were riding our wheels and the cop took us off, told us to get off and I was on Second street and we walked—

Q How far was it from where the policeman took you off your wheels to the place of the accident? A Just a block, Second street, from Passaic street. 10

Q What became of the other man? A He stopped in a store before the accident.

Q Were there any lights in that street, any street lights or anything of that sort? A Where? In Hope avenue or Jefferson street?

Q Jefferson street? A Yes, there was a light on the corner.

Q What kind of a light is it? A There is light from the store and there is light there that shows on the corner light too a street light, a big light. 20

Q What kind of a light is that? A A big electric light.

Q After the man was struck, how far did the automobile go till it stopped, or how far—

Mr. Kalisch. I object to that as leading.

(Question withdrawn.)

Q After the accident, did you go up to the scene or did you go away or what did you do? A No, I went up to as far as the accident. 30

Q Did you see the man lying there or not? A Yes, sir.

Q When the man was lying there in the gutter, how far away from him was the automobile?

Mr. Kalisch. Objected to as leading.

Objection overruled; defendant excepts.

A About twenty feet? 40

Harry Pruzansky, cross.

Q In which direction? A That the man, further than the man, ran over the man.

Q Towards Hope avenue? A Yes, sir.

Q And, when the man was lying there, how far was he out from the gutter from the curb, on the northerly side the side that you were on, of Jefferson street? A Well, he was lying near the gutter.

Q How far out? A About five feet.

Q When you went up there did you see anything else lying around? A Yes, sir; there was a wheelbarrow and bag of coal, I think it was. Because the barrow was directly broke, the wheelbarrow was broke after that.

Cross examination by Mr. Kalisch.

20 Q What is your name? A Harry Pruzansky.

Q Where do you live? A Number eleven Vreeland avenue.

Q Passaic? A Yes, sir.

Q Where do you work? A Well, I work all over.

Q What do you mean? A Well, do you mean that day, or—

30 Q Where do you work now? A Now, I am working at Rutherford.

Q Where did you work on that day? A At Passaic, on Ninth street.

Q Where? A On Ninth street.

Q What is the name, who did you work for? A Mr. Storrs, he has got a candy store on Monroe street and he owned that building, a twelve-family house; we put in twelve sinks for him then that time.

40 Q Were you working in the candy store? A No, sir.

Harry Pruzansky, cross.

Q Who were you working for?

The Court. He said this man had a candy store and he worked in the apartment house which the man who had a candy store owned.

Q Who were you working for? A For myself; I am in business for myself.

Q What business were you in? A Plumbing.

Q And you were working at this candy store? A I was not working at the candy store.

Q You were working in this six-family house? A I was working in Ninth street on a twelve-family house.

Q What were you doing there? A Putting in twelve sinks.

Q When did you quit? A I quit a little after five; about twenty-five minutes after five.

Q How do you know it was twenty-five minutes after five? A Because, when we got to Second street we rode on the wheel and it did not take us long and when we got to Second street it was half-past five, the half-past five bell rang and we stopped, and I was talking a little to that fellow and he went in a jewelry store.

Q When you quit work it was dark, wasn't it? A Well, of course, it ain't daylight.

Q Wasn't it dark when you quit work at half past five? A I was working inside and I could work.

Q When you quit at half past five it was dark, wasn't it? A No, it was not so dark. Of course it was towards evening.

Q It was not dark? A It was towards evening.

Q Was it dark? Were the lights lit in the street when you quit work? A Yes, sir.

Harry Pruzansky, cross.

Q Were the lights lit in the houses when you quit work? A Sure.

Q And you had a bicycle, did you? A Yes, sir.

Q And you rode on this bicycle? A Yes, sir.

10 Q You were going home? A I was going home.

Q And you rode in the middle of the street, did you? A Yes, sir, of course, when I rode, but not when I was riding from Jefferson street; I did not ride from Jefferson street on a bicycle.

Q Why not? A Because the cop took me off at Second street; he told me to get off because I had no light on the bicycle.

20 Q Who were you riding with? A A friend of mine, he was working for me at that time.

Q What is his name? A Abe Rachel.

Q He was going home with you? A Yes, sir.

Q And you got to Jefferson street and had to get off of your wheel, did you? A We went off the wheel before we got to Jefferson street.

30 Q Was your friend riding on the wheel with you? A No, he went off at the same time and then we walked about a half a block and then he went into a jewelry store.

Q What did he go in the jewelry store for? A He is married now; he spent about two hundred and fifty dollars or three hundred dollars for a diamond; I don't know how much. He is married now, too.

Q You went on your way, did you? A Yes, sir.

40 Q How long did it take you to get from where you worked to Jefferson street? A It

Harry Pruzansky, cross.

did not take me long; it is about three blocks and it took me about, I should think, ten minutes; I would walk that.

Q Then you were on the sidewalk with your bicycle, were you? A Yes, sir.

Q And you were leading your bicycle, were you, ahead of you? A I had it right on the side. Not ahead of me. Right on the side. 10

Q And you were not paying any attention to what was going on on the street, were you? A There was nothing on the street.

Q You did not pay any particular attention to this automobile passing you, did you? A No, sir, of course not.

Q You were looking at your bicycle, weren't you? A Yes, sir.

Q It was nothing unusual for an automobile to pass you, was it? A Of course, the automobile did not bother me, I was on the sidewalk. 20

Q You did not give it much attention, did you? You did not give it any attention? A Of course, you always look when you see something going through the street.

Q You did not give it any particular attention, did you? A I don't understand what you mean?

Q Did you give the automobile any particular attention because it went by you? A No, it did not bother me. 30

Q How do you know, did you hear any horn blow before it went by you? A No, sir.

Q Will you say no horn was blown? A No, sir.

Q What do you mean? You did not hear it or will you say there was not any blown? A There was not any blown, because if there was, if it would be blown, I would hear it. 40

Harry Pruzansky, cross.

Q Do you want to tell this jury there were no lights on that automobile? A There was no headlights, because the headlights, you could see whether it was lit, I could see if it was lit, I know that.

10 Q Do you want to tell this jury there were no lights on that automobile? A The back light, I seen that, a little light, but I did not see any other lights.

Q Why did you tell Mr. Ward there were no lights on the automobile?

Mr. Ward. I object. He said there were no headlights.

Objection overruled; plaintiff excepts.

A Well, Mr. Ward asked me if there was any headlights on the automobile and I said no.

20 Q Mr. Ward asked you whether there were any lights on the machine and you said no; I will refer to the minutes—

Mr. Ward. I object to the question and prefer to have the minutes referred to. My recollection is I asked whether there were any headlights on the automobile.

Q You say you saw a tail light, did you? A Yes, sir.

30 Q What color was it? A Red.

Q Did you notice the small lights on the front of the machine, not the headlights, but the oil lamps? A I know what those lights are, yes.

Q Will you swear they were not burning? A I would not say they were or was not, because I could not see them lights, but I always see from far away headlights.

40 Q All you saw was the tail light? A Of course, I saw in the back, I was in the back and I could see there.

Harry Pruzansky, cross.

Q You don't know whether those side lights were burning or not on the front of the machine?

A I would not say yes or no.

Q After the machine passed you, you did not pay any more attention to it? A I don't think it took two minutes and I had to pay attention already.

10

Q After this machine passed you, you did not pay any more attention, did you? A Of course, I seen the machine pass.

Q After it passed you, you did not pay any more attention to it, did you? A I don't understand what you mean.

Q After this machine had gone by you, you did not pay any more particular attention to it? You did not pay any more attention to it, did you?

20

The Court. He don't know what you mean by paying attention.

Q You did not look at it any more, did you?

A Yes, I did.

Q What did you look at it for? A I was always looking ahead of me. I was always looking ahead, I could not look just at the bicycle, because I am liable to fall over it.

Q You were wheeling your bicycle? A I was not riding.

30

Q You were leading your bicycle? A I was, yes, sir.

Q What did you have to look at the automobile for then? A I was not looking at the automobile; I was looking at the street.

Q You were looking at the sidewalk as you were going along, weren't you? A Yes, sir.

Q The automobile did not bother you any more, did it? A No, sir.

40

Harry Pruzansky, cross.

Q Then, why did you tell the jury you saw the automobile run into this man? A What is the question?

Q Then, why did you tell this jury that you saw the automobile run into this man? A Because I seen; I looked in the street, and he was
 10 right on the same side with me, the automobile. I did not look to the middle of the street or the other side of the street. I was looking just straight ahead and when I was looking at the side I could always see the side of the street.

Q You said, after the machine passed you, you did not pay any further attention to it?

Mr. Ward. Objected to. The witness has not said that.

The Court. I don't think he said that.

20 *Mr. Ward.* The counsel is assuming he said that, but he said otherwise.

Q Didn't you say that after the machine passed you, you did not look at it any more? A I was not looking, but I seen the automobile pass me and I seen him going right ahead.

Q And you did not bother any more, you did not look at it any more? A I don't know what you mean by bothering, I was not dodging
 30 around, no.

Q You did not look at it, didn't you say, after the machine passed you you did not look at it any more, you were going on about your business? A I was not looking at him, but I was seeing him just the same.

Q You were not looking, but you were looking, which was it? A Of course, I seen the automobile, even if I did not want to see it; I had to see it, because it was right in front of me and
 40 I had to see it.

Harry Pruzansky, cross.

Q After it passed you, you did not look at it any more, did you? A Yes, sir, I did.

Q What for? A I was looking at the sidewalk and the machine run right by the sidewalk; I had to see it.

Q But, when it passed you, you went about your business with the bicycle? A The bicycle 10
did not bother me.

Q But the automobile did bother you? A No, sir. I seen the bicycle and I could see the same side on the street.

Q But after the automobile passed you, you did not pay any more attention to it, you did not look at it any more? A I was not looking extra at the machine; I was looking at the street and I seen the machine.

Q Why did you tell this jury then that you 20
saw the machine run right into this man? A Because I did.

Mr. Ward. I object. The witness has said that he was looking at the street and he saw the machine and counsel then asks, "Why did you tell the jury you saw the machine run into the man?"

The Court. He had already answered the question, he said because he saw it. 30

Q Did you notice this man crossing the street with the wheelbarrow before the machine passed you? A He was not crossing the street, he was going straight ahead.

Q Did you notice this man in the street? A Yes, sir.

Q When did you notice him? A Well, I was about eighty-five feet away at the time I seen first the man, I seen the man before the automobile passed me. 40

Harry Pruzansky, cross.

Q You were eighty-five feet away from him?
A That is what I figure, eighty-five feet or seventy-five feet maybe.

Q You saw the man before the automobile passed you? A Yes, sir.

10 Q Where was he? A He was on the same side with me, the same side of the street with me.

Q What was he doing? A He was wheeling a wheelbarrow.

Q Was he on the sidewalk? A No, he was not on the sidewalk.

Q You said, on the same side of the street with you, where was the man? A The same side where the sidewalk is.

20 Q Was he walking on the sidewalk? A No, sir.

Q Where was he? A Walking right by the sidewalk.

Q Which way was he going? A He was going towards Hope avenue.

Q And you say he was eighty-five feet ahead of you? A About eighty-five or seventy-five, I cannot tell just exactly.

Q And the lights were lit in the street? A Yes, sir.

30 Q It was around six o'clock? A It was about half past five or six.

Q And do you want to tell this jury that you could see eighty-five feet ahead of you with that light there? A Yes, sir. If you will let me explain, I will tell you why—

40 Q Explain all you want to? A Because that front light in the store, that store light and the corner, always was burning and that makes it so that anybody going there in front of the light and I was way in the back of the light, I

Harry Pruzansky, cross.

could always see a man going there when he is going in front of the light.

Q What light did this man go in front of? A That street light, the light from the street and the light from the corner store.

Q The street light is on the corner? A Yes, sir. 10

Q Then the man must have been on the corner, was he? A No, he was not just on the corner.

Q How far away from the corner was he? A That is what I say, about sixty or sixty-five feet, because there is a corner light and that house.

Q Do you mean to say that that corner light threw a reflection back sixty feet? A Well, I don't know if it throwed it or not, it was there. 20

Q I am asking you if you mean to say that that corner light at the corner of Hope avenue and Jefferson street threw a reflection back sixty feet on Jefferson street? A I don't know what the reflection is. I know when anybody is walking in front of the light I can always see him away there in black and white.

Q Now, I want you to tell this Court and Jury whether that light threw a reflection back sixty feet from the corner of Hope avenue and Jefferson street. A Well, I don't know what you mean by reflection. 30

Q You say the reason you saw this man was because the light was on him, didn't you? A Yes, sir.

Q Do you mean to say you could see sixty feet back from Hope avenue? A Yes, sir.

Q I am asking you whether the light threw a ray back sixty feet? A Yes, sir. 40

Harry Pruzansky, cross.

Q What kind of a light was it? A An electric light.

Q A regular arc light? A Yes, sir, an arc light, a big light.

Q And you took particular notice of the man that he wore white pants? A Yes, sir.

10 Q When did you notice that? A I noticed those before.

Q What do you mean? A When I first seen the man, I seen it was a man with white overalls, I could always tell what the overalls are.

Q This would be eighty-five feet ahead of you? A Yes, sir. I could not say seventy-five or eighty-five, or maybe a little less, or maybe a little more. I figure about that.

20 Q Do you want to correct that? A No, I don't correct it at all, I figure it is about that much.

Q Can you point to the distance in this room which you consider eighty-five feet? A No. This room ain't eighty-five feet.

Q Was he a good deal further away from you than the length of this room? A He was a little more than this room is.

30 Q How much more? A I should say about eighty-five feet.

Q Please tell me how much more he was away from you than the distance of this room? A It must be about thirty feet more than this room, as I could not say exactly just how much more than this room is.

40 Q Was it about half again the length of this room? The length of this room and half again the length of it? A About that, maybe, maybe about the width of this room and about half of

Harry Pruzansky, cross.

it, maybe, maybe a little more or less, maybe a little more or a little less.

Q Is it a little more or a little less, which is it? A Maybe a little more maybe a little less, maybe just about the same.

Q This is a pretty wide street, Jefferson street, is it not? A Yes, sir, Jefferson street 10
is a pretty wide street.

Q How wide do you think it is? A To my calculation I think it is about fifty feet. It is wider than any street we have got in Passaic.

Q Is it as wide as the length of this room or the width of this room? A I think it is, with the sidewalks, of course.

Q And you say this man was walking about five feet from the gutter, was he? A Yes, sir.

Q On Jefferson street? A On Jefferson 20
street, yes, sir.

Q Pushing a wheelbarrow? A Yes, sir.

Q When that automobile passed you the automobile was going the same way you were going wasn't it? A Yes, sir.

Q The automobile was on the right hand side of the road, wasn't it? A Yes, sir.

Q Going up the middle of the street wasn't it? A Yes, sir.

Q Was it going fast or slow? A It was 30
going quite fast.

Q What do you mean, quite fast? A Well, it was going fast. I could not say just exactly how many miles it is going an hour that time when it was going past me, but it was going quite fast because there is a clear street, there is no children running around the street.

Q It was going up the middle of the street was it? A No, it was not going up the middle 40
of the street, because if it was going up the

Harry Pruzansky, cross.

middle of the street he would have kept five or six feet away from the corner.

Q You figured that out didn't you? A Well—

Q Didn't you say a moment ago that the automobile was going in the middle of the street?
10 A No, I don't think I did.

Q When I said the middle of the street you said yes, sir? A I did not understand just what you meant.

Q Do you want to change that now. Was he going in the middle of the street? Do you want to say now that he was not going up the middle of the street? A Well, if he would go in the middle of the street he would not get on the side of the street, he would go in the middle of the
20 street.

Q Do you want to change that now and say it was not going in the middle of the street? A Do I want to change that? It was going on the right side, that is what I can say.

Q How near to the curb was she? A Well, it was going on the right side, about, well, I would not say, I think about six feet away from the gutter, it was. It was on the right side.

30 Q You are sure it was not ten feet away from the gutter? A I have not measured it, no, I don't think so.

Q You are not so sure? A No, sir.

Q The automobile got ahead of you didn't it.
A Yes, sir.

40 Q How could you see this man ahead of you if the automobile was ahead of you. And how could you see the automobile hit the man if the automobile was ahead of you? A I seen the man before, before the automobile passed me.

Harry Pruzansky, cross.

Q I understood you to say you saw the man before, but will you tell this court and jury how you could see the automobile hit the man when the automobile was right in front of you? A Well, I see he had hit the man after he passed me all right.

Q You took it for granted, after the automobile passed you, the man being in the street, he had to be hit with the automobile? A Yes, and I could always see if he got hit with the front end and not with the back that he was in front of the machine. 10

Q You did not see the automobile hit the man you simply took it for granted? A How could I see if the automobile was in the way. The automobile hit him, you could always see that, it hit him with the front, it could not hit him with the back of the machine. 20

Q You could not see it, could you? A Of course, I could.

Q You could not see the automobile hit the man could you? A I should say I could.

Q Was the automobile in front of you? A Yes, it was.

Q How could you look through the automobile and see the automobile hit the man? A Well, I could see that the automobile when it was hit the man all right, and I could see when the automobile passed the man he was lying already in the road and the automobile stopped about twenty feet after the man was lying in the road. 30

Q After the man was struck you saw him lying in the road? A Yes, sir.

Q I am asking you about striking the man? You did not see the automobile hit him, did you? 40

Harry Pruzansky, cross.

A I seen it just a little before the automobile hit him, I seen him then, too.

Q You saw the man before the automobile hit him? A Yes, sir.

Q Did you see the automobile hit the man? A Just the same time?

10 Q Yes? A Of course, I can imagine that. I can see when the automobile is on to the man already, I can always see and I was in the back of the machine.

Q You were in the back of the machine? A Yes, sir.

Q You could not see this automobile hit the man, could you? All you could see was the man was struck? A Yes, of course he was struck.

Q You could not see the automobile hit him? 20 A I don't understand what you mean if I could see or not. Of course, if I stood in the back I cannot see just exactly what is going on, but I could not notice that it did hit him, the machine hit him because he was in front of the machine.

Q And you saw the man lying down, that is why you say the automobile hit him? A No, not why, because I see the man going, I see the man was going in the street.

30 Q Why didn't you walk in the middle of the street with your bicycle?

Mr. Ward. Objected to as immaterial.

Objection sustained; defendant excepts.

Q Who have you been talking with since this accident? A With who?

Q Yes? A Now, what do you mean; with who I was talking about this here case?

Q Certainly? A About this case, I was not talking to anybody at all till this here Friday night when I got the subpoena, because I 40

Harry Pruzansky, cross.

never thought I would be bothered with the case; I never wanted to be bothered with the case; I lost four days already and nobody is paying me for four days and I don't want to be bothered with it.

Q How did they know that you knew anything about it if you did not talk to anybody about it? A When I came home that night and I said to my wife, I just seen a man got killed, and about two hours later, I think they brought him back to our rear like, and when I went away, I met a woman downstairs and she said, "Here is the man you seen get killed." 10

Q Did you ever tell anybody outside of your wife that you saw this man get killed? A Well, of course, there was a lot of people there, but I never thought I was going to be bothered about it. 20

Q Did you tell anybody outside of your wife that you saw this man get killed? A I don't know. There was a lot of people around there. There was a man lived next door from me, of course, he heard it.

Q Did you know Mr. Kaplan before this accident? A I know Mr. Kaplan for a long time. He is a Passaic man, that is why I know him. 30

Q Did you tell him you saw this man get killed? A Well, he was around my place.

Q Please answer the question. Did you tell Mr. Kaplan that you saw this man get killed? A Yes.

Q When did you tell him? A I don't remember the time when I told him about it.

Q Was it right after the accident? A It was after this, yes. 40

Harry Pruzansky, cross.

Q How long after the accident? A Of course I could not tell that. I cannot remember when it was.

Q Was it the next day or week after? A No, it was not the next day. I could not just tell you exactly, because I never had that in my mind; I never thought to be here about it.

Q What did you tell Mr. Kaplan about this accident? A I told him that I seen it, that's all, when he asked me, and I never knew that this matter would be brought here.

Q Did you see Mr. Kaplan again about this accident? A No, sir; I only seen him once.

Q And did you give a statement to Mr. Kaplan? A I did not. You cannot prove it neither, because I have not given him any. You cannot show any statement I have given him.

Q And how long do you say you have known Mr. Kaplan? A I cannot say just exactly how long.

Q Have you known him one or two years or three years? A May be about a year.

Q Then you did tell somebody besides your wife about this accident, didn't you? A Well, there is the man next door to me and the man downstairs.

Q You knew Mr. Kaplan didn't you? A Mr. Kaplan was not around that time.

Q You told him about the accident, didn't you? A That was way after this.

Q Why didn't you say you told Mr. Kaplan about it without my asking you? A If you will ask me about somebody else, maybe I did talk with the man; I will tell you about it. I spoke to a lot of people and I cannot tell you just exactly everybody I spoke to about it.

Discussion.

Mr. Ward. We offer in evidence the almanac of 1916 and I read from it that on the first of November, 1916, the sun sets—

Mr. Kalisch. I object. Mr. Ward is doing that for the purpose of offering it in evidence. I submit that it ought not to be put before the jury because we do not know if that is official. 10

The Court. Do you object to the almanac?

Mr. Kalisch. This accident happened in Passaic.

The Court. Do you object?

Mr. Kalisch. Yes, I do.

The Court. I don't think there is any proof of it.

Mr. Ward. I always understood that the almanac was admissible in evidence without any proof? 20

The Court. There ought to be some proof of its authenticity.

Mr. Ward. Here is a standard almanac and I think that is one of the things that is admissible.

The Court. What proof is there that it is standard? 30

Mr. Ward. Well, the almanac itself, I think that is one of the things that proves itself. That is my impression from my old law school days, but I may be wrong. If your Honor will permit me, I will look up the matter and renew the offer after recess.

The Court. Have you any other evidence?

Mr. Ward. With the exception of that, that is all. 40

Discussion.

The Court. I don't think I will let the boy you proffer as a witness be sworn, he is so very small.

Mr. Ward. He is the only witness we found.

10 *The Court.* What is it that you want to prove by the almanac?

Mr. Ward. The setting of the sun, also in New York the length of the twilight.

The Court. I am inclined to think it is admissible if the authenticity of the book itself can be shown.

The Court then took a recess until two o'clock this day.

20

AFTER RECESS.

Mr. Ward. It is my contention, sir, that this is something of which the Court must take judicial notice. It is of aid and assistance to the Court, and, I think, it also comes within that rule which is laid down in the books as to the exception to hearsay evidence, as matters of a public nature, and it is even said that such matters come within the scope of judicial notice, any information which the Court considers reliable, whether direct information or hearsay, may be resorted to.

30

The Court. That is the point I make; whether I have to assume that this is reliable.

Mr. Ward. It seems to me the World Almanac is something that is recognized as a public authority, and, aside from that, I think if the Court can convince itself of my

40

Frank Briscoe, direct.

statement of fact being right, I would have a right to rely upon the fact in arguing it to the jury anyway. In other words, it is something of which we must take notice, judicial notice, the time the sun sets on that day. It is beyond dispute.

The Court. Isn't there some recognized authority besides the book that is printed? 10

Mr. Ward. I might say that heretofore we have relied upon Mr. Probert of this city and I subpoenaed him last night, and, much to my chagrin I learned that Mr. Probert has given up the keeping of public records since last August and they are no longer available; so I made every effort and the next best thing I could do was to turn to the World Almanac. 20

The Court. I will overrule the offer.
Plaintiff excepts.

FRANK BRISCOE, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q You were working for Mr. Abbott, were you, or, you have been working for Mr. Abbott? 30

A Yes, sir.

Q Were you working for him at the time this accident happened? A Yes, sir.

Q What was the first you knew about this accident? A The first I knew, I was weighing sugar and I happened to look up through the window and I saw a crowd of people and I ran out, ran to the door and I seen a man laying in the mudgutter and a wheelbarrow all smashed to pieces and coal all spread around. 40

Frank Briscoe, cross.

Q Whereabouts was the man lying in the gutter; how far from the gutter? A About three or four feet from the mudgutter.

Q On which side of the street? A On the right side.

10 *The Court.* On the same side that your store was on or on the other side?

The Witness. On the other side.

Q About how far from the corner of Hope avenue. A Around forty feet from it.

Q When you came out of the store, as you came out, could you see the man or not? A You could not see him because of the crowd that was around him.

20 Q Could you see the crowd around him? A Yes, sir, you could see that.

Q At that time, could you see across the street if you looked? A Yes, sir.

Q The light from your store, how far does that shine? A It shines way down there and there is an electric light on the corner, so you can see way down there.

Cross examination by Mr. Kalisch.

30 Q Your store is on the corner of Jefferson avenue? A Yes, sir, on the corner of Jefferson street.

Q The light was burning in your store at the time of this accident? A Yes, sir, the light was burning in the store.

Q Where was that light? In the front window? A No, there was the light in the middle of the store.

40 Q Why was the light burning? A Well, it was dark in the store.

Frank Briscoe, cross.

Q The lights were burning in the street, weren't they? A Yes, sir.

Q And you did not see inside, did you? A No, sir.

Q When you came to the scene the man was already lying there? A He was lying in front of the mudgutter. He was a little alive yet. 10

Q Did you look at the machine? A Yes, sir.

Q Did you notice the lights burning? A No, no lights. I did not see no lights.

Q Where? A On the automobile.

Q There were no lights on the automobile? A No, sir.

Q Didn't you see them? A I looked around and could not see none.

Q Was the tail light burning? A I could not tell you that, I did not see nothing about that either. 20

Q Why didn't you? A I looked but I could not see no lights.

Q Will you say there was no lights burning? A No, there was not.

Q Or, don't you know? A No, there was no lights.

Q The tail light was not burning either? A No, it was not burning. 30

Q Are you sure of that? A Yes, sir.

Q Eh? A Yes, sir.

Q Do you know Frank Briscoe? A My name is Frank Briscoe.

Q Do you know Stanley Miller? A Yes, sir.

Q Didn't you say to Stanley Miller at the time that the glare lights were not burning but the side lights were burning, didn't you say Monday or Tuesday of this week to Stanley Miller that the glare lights were not burning but 40

Lillian Baker, direct.

the side lights were burning? A I did not tell him anything about that.

Q You did not say that? A No, I did not say nothing about that.

Q What did you say? A Nothing.

Q Eh? A I did not say nothing.

10 Q Didn't you tell him the tail lights were burning? A No, sir.

Mr. Ward. I offer in evidence the letters of administration, which are admitted.

PLAINTIFF RESTS.

20 *Mr. Kalisch.* I move for a nonsuit on the ground that no negligence has been shown on the part of the defendant and contributory negligence has been shown on the part of the deceased.

Motion denied; defendant excepts.

Exception noted as ground of appeal.

LILLIAN BAKER, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kalisch.

30 Q You are one of the defendants in this suit?

The Court. I understood that the suit against her had been discontinued and that she had been eliminated as a defendant.

Mr. Ward. She is not one of the defendants.

Mr. Kalisch. Wasn't she sued?

Mr. Ward. She is not one of the defendants.

40 *Mr. Kalisch.* Have you discontinued the action?

Lillian Baker, direct.

Mr. Ward. She is not at this time one of the defendants.

Q Were you served with papers in this suit?

Mr. Ward. Objected to as irrelevant and immaterial.

The Court. How is that material? 10

Mr. Kalisch. Merely to show her interest in this suit.

The Court. Why would the defendant want to show her interest?

Mr. Kalisch. Now that the action has been discontinued it may have some bearing upon her interest.

The Court. What bearing? I am entitled to know.

Mr. Kalisch. In my argument to the Jury. 20

The Court. In what way?

Mr. Kalisch. I don't want to disclose what is in my mind now, if your Honor overrules the question?

The Court. Don't you think as a member of the bar that the Court has a right to know what your motive is?

Mr. Kalisch. I withdraw the question. 30

Q Are you a daughter of John Baker, the defendant in this suit? A Yes, sir.

Q Where do you live? A No. 33 Paulison avenue, Passaic.

Q Do you live with your father and mother?

A I live with my married sister.

Q Where does your father live? A They live down in Second street.

Q Where did you live on the first of November, 1916? A At that same address. 40

Lillian Baker, direct.

Q I believe your father has an automobile.

A Yes, sir.

Q What kind of an automobile is it? A An Oldsmobile.

Q Do you know what year it is? A 1912.

10 Q You run the car do you, you did on this night? A Yes, sir.

Q Your father bought the machine? A Yes, sir.

Q Did you have the machine out on the first of November, 1916? A Yes, sir.

Q Who was with you, if anybody, at that time? A At the time of the accident, do you mean?

Q Yes? A My sister was with me.

20 Q What time of the day did you take the machine out? A I took it out in the afternoon.

Q What time about? A About two o'clock. I believe, as near as I can remember, about two o'clock in the afternoon.

Q Were you riding all afternoon? A I took my parents out, we went to the cemetery that afternoon, it was a Catholic holiday, the first of November, All Saints Day, and we went to the cemetery.

30 Q How long were you in the cemetery?

Mr. Ward. Why not get right down to the accident?

Q How long were you in the cemetery? A I think we returned—I don't know what time we returned. I think somewhere around five o'clock.

Q Where did you go? A We went down with my parents, down to the store.

40 Q Where did you say their place was? A In Mercer and Second streets.

Lillian Baker, direct.

Q What is it, a home or a store or what?

A A store and rooms.

Q What kind of a store? A A bakery store.

Q What did you do there? A We talked awhile and had some lunch and then I was going home with my sister.

Q What time was it when you left your father's bakery store? A It was between five and ten minutes to six. 10

Q Can you tell the Court and Jury whether it was light or dark? A Oh, it was dark.

Q What have you to say as to whether your lights were burning or not? A The lights were burning.

Q What lights? A The side lights and the tail light was burning.

Q Where did you go? A We left the store at Mercer street and rode down to Jefferson street. 20

Q Did you meet with an accident on Jefferson street? A Yes, sir.

Q Just tell the Court and Jury in your own words, how this thing happened? A I was driving along Jefferson street, and, never thinking anything was going to occur when suddenly this man appeared to loom up, all of a sudden before me, and, before I could,—why, he was only two or three feet in front of me when I saw him, when I quick turned my wheel to the left, to turn my car over to the left, but I did not ride over him, it must have been the back of the car that struck him. I stopped the car. 30

Mr. Ward. I ask that the expression "It must have been the back of the car that struck him" be stricken out.

Motion denied; plaintiff excepts.

Lillian Baker, direct.

Q Did the front wheels strike him? A No, they did not.

Q The first you saw of him, you say, was when he was two feet ahead of you? A Yes, two or three feet.

10 Q What did you do then? A I naturally got out of his way, or at least wanted to get out of his way, I tried to get out of his way.

Q What did you do in order to try to get out of his way? A I turned my wheel, of course.

Q You turned your wheel which way? A To get out of his way I would have to turn to the left.

20 Q What about the speed of your car? What did you do about going ahead or stopping? A Why, of course, I turned my wheel to the left and stopped.

Q What did you do to stop? A I put the brakes on, of course.

Q When you turned your wheel to the left you say the front wheels did not hit the man? A No, sir.

30 Q What did hit the man? A I don't know, I don't know whether it was the back wheel or the fender, what it was. I wanted to get out of his way.

Q Did you have a speedometer on your car? A Yes, sir.

Q Do you know about what speed you were going at just directly before this accident happened? A Well, about, it was after ten, I don't know whether I looked at the speedometer but it was after ten miles. It might have been eleven, between eleven and twelve.

40 Q What would you say whether it was light or dark on Jefferson street? A Oh, it was dark, it was dark there.

Lillian Baker, direct.

Q Was there a street light there? A Yes, but that was on the farther corner.

Q How far was that farther corner away from this point of the accident, about? Can you point out the distance in this room? A I guess about a hundred feet from the corner, all of that.

Q Did you do anything before this accident happened in the way of giving notice of your approach? A Oh, I always do that before I approach a corner. 10

Q Not what you always do, did you do it then? A I did then, yes, sir.

Q What did you do? A I blew my horn.

Q How soon before the accident was it that you blew your horn? A Oh, well, only about a half minute before, I think.

Q What kind of a horn is it? A A hand Klaxon, one where you press down. 20

Q Can you say whether or not that makes a loud sound? A Oh, it is, yes, very loud, very loud resonant sound.

Q You say you gave this hand Klaxon sound? A Yes, sir.

Q More than once or twice? A Oh, two or three times or four times.

Q At that time were you facing the way you were going? A Yes, sir. 30

Q Did you see anybody in the street? A No, absolutely not.

Q When is the first you saw of this person? A Why, just as I was within two or three feet of him.

Q Where was he with reference to your machine, what position was he in? A Why, he was almost turned, with his back at me.

Q What? A Almost with his back towards me. 40

Lillian Baker, direct.

Q How much of his back was towards you and how much was not? A Well I don't know just what an angle you might term it.

Q Where was his wheelbarrow? A He was pushing it.

10 Q Which way was the wheelbarrow pointed?
A A little to an angle too.

Q Which way? Which way was it facing?
A To the left of him.

Q That is, the opposite side of the street?
A To the left of him.

Q That is, the opposite side of the street?
A Yes, sir.

Q Which way was he facing? A The same side.

20 Q Where did he come from? A That I have no idea.

Q Where did it appear that he came from?
A I don't know, unless he was trying to cross the street.

Mr. Ward. I ask that that be stricken out as a conclusion. She cannot tell where he came from, she said.

30 *The Court.* You should object to the question. She has already said she did not see him.

Mr. Ward. That he appeared to be crossing the street. That is not responsive to the question and it is a conclusion.

The Court. The question was where did he appear to come from. Of course, that is more or less of a speculation and the witness said she did not see him.

40 *Mr. Ward.* I ask that the answer be stricken out.

Lillian Baker, direct.

Mr. Kalisch. The objection comes too late. The witness has answered the question. Courts have specifically held over and over again that the objection must be timely.

Motion denied; plaintiff excepts.

Q How much did your machine pass the man? A Why, the whole of it, I think. 10

Q What? A The whole of it passed, I believe, yes.

The Court. How far were you from the right hand side of the road?

The Witness. From the curb, do you mean?

The Court. Yes.

The Witness. About six feet, I should say. 20

Q What apprised you of an accident? How did you know something had happened? A I heard the falling of wood.

Q What did you do then? A I naturally got out to see what was the matter.

Q Did you see the man? A Yes, sir.

Q Where was he lying with reference to your machine? A Why, he was in the back of the machine. 30

Q How far back? A Oh, just a few feet.

Q What? A Just a few feet back.

Q Two feet do you mean? A Yes, sir.

Mr. Ward. I object to counsel leading the witness on this matter.

The Court. Yes, don't lead her.

Q What do you mean by "a few feet?"

A About two or three feet. 40

Lillian Baker, direct.

Q How was the man dressed, did you notice?

A I did, yes. He had dark clothes on, very dark clothes on. I believe it was dark gray, if I am not mistaken, a dark gray suit.

Q Did he have light overalls on? A No, he did not have any on of any kind.

10

Q What did you do? A Why, the first thing I did was to see what was the matter, and I saw the man was unconscious, but still moving and the first thing, in all my excitement, I ran to the corner and telephoned for help.

Q And then, where did you go? A I telephoned to the police station and had them send the ambulance down and they did.

Q What did you do then?

20

Mr. Ward. We object to that as immaterial.

The Court. How is that material?

Mr. Kalisch. We want to know what she did, where she went.

The Court. What difference does it make where she went.

Mr. Kalisch. It is all a part of the transaction of the accident.

30

The Court. What difference does it make where she went? Does it throw any light on the case?

Mr. Kalisch. Does your Honor overrule the question?

The Court. No, I want to know from you. You stand there when an objection is made and when I ask you the purpose of a question you talk in a general way; I ask you how it is relevant.

40

Lillian Baker, cross.

Mr. Kalisch. I think it is relevant to know what she did at this accident or immediately thereafter.

The Court. Why is it?

Mr. Kalisch. As showing the surrounding circumstances as to what she did with reference to the man, where the man lay, what she did with reference to him, where the automobile was and so on.

10

The Court. You may ask that. I don't think anything that is relevant is objected to. You may ask her what she did.

Q You rang for an ambulance, you say? A I telephoned for an ambulance.

Q Then where did you go? A I went back to the man, of course.

Q Then what did you do? A I took my blankets and wrapped him in my blankets, and by that time the ambulance had arrived.

20

Q And then what did you do? A And they took the man and took him up to the hospital.

Q And where did you go? A Then I went to the police station and reported.

Cross examination by Mr. Ward.

Q You had had your father and mother out that day? A Yes, sir.

30

Q You were out on their business, on your father's business? A Yes, sir.

Q Is it the sister with whom you live that you were with at that time? A Yes, sir.

Q I think you were asked what was the first thing that apprised you of the accident and you replied the falling of wood? A Yes, sir.

Q Was that the breaking of the wheelbarrow, do you mean? A No, I think he had a pile of coal and wood on his wheelbarrow.

40

Lillian Baker, cross.

Q So the first thing apprised you, as I understand you, of the accident was when you heard that falling, whatever was on his wheelbarrow falling? A Yes, sir.

Q How far did you go after that, do you think? A After what?

10 Q After you heard the falling of this wood? A Oh, I stopped immediately.

Q Of course, you went some distance? Can you tell us how far? A Well, after I saw the man, you see, I only went a few feet when I stopped the car.

Q The first thing that apprised you of this accident, you say, was the falling of whatever was on his wheelbarrow which you say was wood? A Yes, sir.

20 Q That is the first you were apprised of this accident wasn't it? A Yes, sir.

Q Are you sure of that? A Yes, sir.

Q How soon after that was it, or how far did you go after that before you stopped your car? A Why, that was almost simultaneous with the stopping of the car.

Q Well, after you heard the falling of the wood or whatever it was, you then had to stop your brakes did you not? A Yes, sir.

30 Q And throw out your clutch, of course, you first had to apply your brakes and then throw out your clutch in order to stop your machine? A I threw out my clutch first and then applied my brakes.

Q You did that practically simultaneously, didn't you? A Yes, sir.

Q Was it dark gray clothes he had on? A Yes, sir.

40 Q Are you sure of that? A I don't know whether it was gray, but I know they were very dark.

Lillian Baker, cross.

Q Black? A I could not say as to the color, because it was very dark there.

Q As a matter of fact, don't you know he had on a pair of white overalls, or yellowish, such as painters wear? A No.

Q You don't know that? A No, sir.

Q You were somewhat excited, weren't you? 10
A Well, I think I would have noticed that, because white would be very visible in the dark.

Q As a matter of fact you were excited? A Well, I don't know. I was excited, naturally, but I think I would have noticed that.

Q This man was pushing a wheelbarrow, you say? A Yes, sir.

Q And his back was almost towards you? A Almost.

Q And he was about six feet from the curb? 20
A Yes, sir.

Q Pushing the wheelbarrow out in the general direction of Hope avenue? A Yes, sir.

Q Going, generally, in the same direction in which you were going? A Almost.

Q And you were about six feet out from the curb? A Yes, sir.

Q Your headlights were not lighted, but your side lights were? A Yes, sir. 30

Q Do you know, as a matter of fact, when the sun set on that day, what time the sun set on that day? A I beg your pardon?

Q Do you know what time the sun set on that day? A No, I do not.

Q Do you know that it was five o'clock?

Mr. Kalisch. I object. Mr. Ward is looking at that almanac and then asking questions whether she knows the sun set at five o'clock. 40

Lillian Baker, cross.

Mr. Ward. I think I am privileged to look at what I please in examining the witness.

The Court. The question will be allowed.

Q Do you know that? A What was the last question?

10 Q Do you know that, when the sun set on that day, that it set at five o'clock? A No, I do not.

Q Do you know that the twilight alone, on that day—you know what twilight is, of course? A Yes, sir.

Q That the twilight alone on that day lasted for over a half an hour, do you know that? A What time did you say the sun set?

20 Q Five o'clock. I beg your pardon, I meant an hour and a half for the twilight lasting an hour and a half—

Mr. Kalisch. I object. Mr. Ward is reading from a book and saying, "Do you know that the twilight lasted such a time" and he is trying to prove something indirectly which he knows is not admissible. It is assuming a fact to be in evidence which is not really in evidence and I object to it.

30 Objection overruled; defendant excepts.

Q Do you know that the twilight on that day lasted for an hour and thirty-one minutes? A No, sir.

Q You do not know that? A I did not look it up in the almanac, of course.

Q There was considerable light there aside from the twilight, wasn't there? A No, sir; it was completely dark.

40 Q The store lights were lighted? A (No answer.)

Lillian Baker, cross.

Q And the electric light was lighted on the corner? A Yes, I remember that.

Q And these headlights of yours or the headlights of that car they cast a radiance for many feet ahead of your car don't they? A The headlights, yes.

Q And you have no difficulty in seeing a great distance in advance of your car when those headlights are lighted, have you? A No. I don't think so. 10

Q Eh? A No, sir.

Q You can see with those headlights lit, the radiance is cast at least a block or three hundred feet? A Oh, not a block.

Q Just think for a moment, on a dark road, on a country road, do you mean to say that you cannot see with those headlights lit at least three hundred feet in advance of your car? A Three hundred feet? 20

Q Yes? A On a very dark road, probably, very likely on a country road you might.

Q Three hundred feet? A Maybe two hundred and fifty to three hundred feet, I don't know just how far you can see.

Q And when the headlights on that car were lighted you could see far enough ahead to discern any object and bring your car to a standstill or stop in plenty of time couldn't you, without striking the object? A Perhaps so. 30

Q Isn't that so, as a matter of fact? A Yes, I believe it is.

The Court. I understand you to say the headlights were burning this night?

Mr. Kalisch. No, sir.

The Court. Were any lights burning in the front of the car? 40

Lillian Baker, cross.

The Witness. Yes, sir.

The Court. Which ones?

The Witness. The side lights.

Q (*By the Court.*) How far could you see with those? A About ten feet ahead.

10 Q You did not see this man until you were there onto him, within three feet of him? A Yes, sir.

Q How is that? Were you looking forward then? A Certainly.

Q How is it you did not see this man before. A I don't know how it is.

Q He was right in front of you? A He could not have been in front of me all the time, or I surely would have seen him.

20 Q How could you fail to see him? You could see with those lights ten feet you say? A Yes, sir.

Q You did not see him until you practically were on him? A Yes, sir.

Q How fast were you going? A Between eleven and twelve miles an hour.

30 Q And you were about six feet from the curb when you struck him? What I do not understand is that you did not see him if you were looking? A Well, if he had been in front of me all the time I certainly would have seen him.

Q You certainly were approaching the point where he was, with your car and you could see at least ten feet ahead, wasn't there any light around there at all? A For a distance, at the farther corner, there was light.

By Mr. Ward.

40 Q Were you talking to your sister? A No I was not.

Lillian Baker, re-direct.

Q Is it not true that you did not notice this man, or know anything about the accident until you heard the falling of the wood, until that apprised you of the accident, that your car had struck this man and struck this wheelbarrow?

A That I did not what?

Q Is it not true that you were first apprised 10
of this accident, as you answered your counsel and answered me, first apprised of the accident when you heard the falling of the wood or whatever it was and this wheelbarrow that you had struck, after you had struck the man and had struck the wheelbarrow? Isn't that so? A The first time I was apprised of the accident?

Q The first you were apprised of the accident. A That is the first time that I knew that I had an accident.

Q Wasn't that the first that you knew any- 20
thing about it at all? A Yes, sir.

Re-direct examination by Mr. Kalisch.

Q Why didn't you have the big front lights burning?

Mr. Ward. Objected to.

Objection overruled; plaintiff excepts.

A Because there is a city ordinance against it, there has been so much trouble about head- 30
lights.

Q You had a city ordinance against it? A Yes, sir.

Q That is why you did not have them lit? A That is why I did not have them lit inside of the city.

Q Don't you know that it is possible to drive your car, or was possible to drive your car at that time, with those headlight lit? A I don't understand you. 40

Lillian Baker, re-direct.

Q Don't you know that under the law, or did you not know that it was possible for you to drive your car with those headlights lit? A Inside of the city.

Q Yes. A Why, I know now. I did not know it at the time.

10 Q You did not know that at the time? A I knew they allowed strong headlights out in the country, on the country roads, but not in the city.

Q Were these lamps on the side of the car oil lamps? A They were both oil lamps and electric.

The Court. Counsel means the ones that were lit?

The Witness. Yes, sir.

20 Q Which were burning? A Both.

Q The oil or electric? A Both the oil and the electric, they are two lights, inside of those side lights, both kerosene and electric.

Q Had you lighted the oil lights as well? A Yes, sir.

Q And when you say that casts a radiance or you can see ten feet ahead that also casts out on the side, does it not? A Yes, sir.

30 Q There is no question about that? A No, sir.

Q You know that you can drive in the city with your headlights so long as you comply with the ordinance or the law with reference to not having the rays extend up, you know that don't you? A No, sir.

Q You don't know that? A No, sir.

Q You knew, of course, that there were people apt to cross and pass there? A Pass there, 40 no. There was no crossing.

Mary Chintala, direct.

Q You knew, of course, that there was apt to be people or things on the street? It was a public street? A No, sir. On the public street?

Q Yes, didn't you know that? A Things on the public street?

Q Yes. A On what public street? 10

Q On Jefferson street, you knew when you were driving along there that there might be other vehicles or other people on that street besides yourself ahead of you or in front of the machine? A Vehicles, certainly.

Q And other people? A How should I know that people walk in the road?

MARY CHINTALA, sworn as a witness on behalf of the defendant, testifies as follows: 20

Direct examination by Mr. Kalisch.

Q Where do you live? A Number thirty-three Paulison avenue, Passaic.

Q Are you a sister to Miss Baker? A Yes, sir.

Q Were you in this automobile on the day of this accident? A Yes, sir.

Q About what time of the day was it when this accident took place? A Just about between five and six, between five minutes of six. 30

Q Around five minutes to six? A Yes, sir.

Q Can you say whether it was light or dark? A It was dark.

Q Were the street lights burning? A Yes, sir.

Q What have you to say as to whether there were any lights on the automobile? A We had the sidelights and the tail lights. 40

Mary Chintala, direct.

Q Where were you sitting in the machine? A In the front, alongside of my sister.

Q Can you tell the Court and Jury whether you were going fast or slow? A Well, we were going at a moderate rate. I don't think it was fast.

10 Q Just tell the Court and Jury when you first saw this man, if you saw him, and just how the accident happened? A As we came from First street we were coming nearing Hope avenue when all of a sudden my sister says, "Oh," and she quick turned her wheel and after she turned her wheel, I heard a crash and she stopped and went up and we saw what had happened and I asked sister to please run to the corner for an ambulance and she did so.

20 Q Can you state whether or not the front of your machine struck the man? A No, sir, the front of the machine did not strike the man.

Q What part of your machine did strike the man? A I don't know. I could not say because we were in the front of the car and the car is long and I cannot say what struck him.

Q When was the first you saw of this man? A When?

30 Q Yes. A Just when my sister, she said, "Oh," we were about two feet from him when she quick turned her wheel.

Q What did you say about keeping on going? Did you keep on going? A No, sir.

Q What did you do? A She stopped immediately, as soon as she could stop with her machine, she stopped.

Q When you got out how far away was the machine stopped from where the man was lying?

40 A I should judge about three feet.

Mary Chintala, cross.

Q Can you say whether or not while you were going along Jefferson avenue your sister did anything to warn about the approach— A When, as a rule we always—

Q Not as a rule, what you did on this occasion? A We did on this occasion, yes, sir; we blew the horn as we were approaching, as we were going along every half block she tooted her horn. 10

Q Did you see the man then when she tooted her horn? A No, sir.

Q When was the first you saw of the man? A The first I saw of him was when we were practically on him. I suppose just almost when she turned away.

Q Did the man carry any lights on his wheelbarrow? A No, sir. 20

Q You say you stopped the machine and the man was lying about three feet on the side of your machine? A No, in the back.

Q What did you do then, if anything? A What did we do then?

Q What did you do then? A We covered him, that is all we did to him.

Q Then did you go home? A No, we went to the police station.

Q What did you do there? 30

Mr. Ward. Objected to.

A The officer asked us to go.

Q And you finally went home, did you? A We went home from there, yes, sir.

Cross examination by Mr. Ward.

Q Were you talking with your sister as you came along there? A No, sir.

Q Not a word? A No, sir. 40

Mary Chintala, cross.

Q You had not said a word to her at all? A No, sir.

Q Not all the afternoon? A Why, we were more in the car besides my sister and myself all the afternoon.

10 Q Were you in the front with her? A No, not in the afternoon; in the evening, yes.

Q Coming up from your father's home? A Yes, sir.

Q Were you in front with her? A Yes, sir.

Q And from the time you had left there you had not said a word? A No, sir.

Q Not a word? A No, sir.

Q There is an electric light there at the corner of Hope avenue and Jefferson street? A Yes, sir.

20 Q One of those big arc lights? A Yes, sir.

Q And two stores, one on each side of the street there? A Yes, sir.

Q With lights in the windows? A Yes, sir.

Q This man had on light painters' overalls didn't he? A No, sir.

Q Are you sure of that? A Yes, sir.

Q You went back and looked, or at least when you were back there you remember distinctly that he did not have? A I remember distinctly

30 he had no white overalls.

Q Light overalls? A I don't think he had any kind of overalls, if I am right.

Q Light trousers, whatever you may call them, whatever it was that covered the lower part of his body, it was light, wasn't it? A I could not say what covered the lower part of his body, for the first thing I know we took a blanket and wrapped him up, as the man was breathing, and I am sure he had nothing light on him, for if he had we would have seen him.

40

Mary Chintala, cross.

Q Can you tell, do you know, whether or not he had something light on? A He had nothing light on.

Q You are sure of that? A I am sure.

Q Do you remember the noise that you heard when the automobile struck something? A Yes, sir.

10

Q Was that the first that you knew of any accident? A Well, that is the first we knew, when we heard that we knew that something had gone wrong.

Q Was that the first you knew that anything was there? A No, we saw him just before that when we went by.

Q And at the time you saw him his back was towards you? A No, sir.

Q Wasn't it? A No, sir.

20

Q Almost towards you? A He was on an angle.

Q Was not his back towards you? A Well, I don't know whether he was so much towards us, it appears as if he had got off the sidewalk, to me, that is all I know.

Mr. Ward. I object to what it appeared and ask that that be stricken out.

Motion granted.

30

Q Won't you answer my question? Was most of his back towards you at that time? A Most of his back?

Q Yes? A I don't know.

Q Did you see the wheelbarrow at that time?

A At that time we saw his wheelbarrow.

Q The wheelbarrow was in front of him wasn't it? A Of course.

Q And he was between you and the wheelbarrow, wasn't he? A Couldn't he be between me and the wheelbarrow?

40

John Baker, direct.

The Court. Don't argue with the counsel. Was he between you and the wheelbarrow?

The Witness. He could not have been between me and the wheelbarrow, no, sir.

10 Q Was he not between you or between the car and the wheelbarrow, between the wheelbarrow and the front of your automobile? A Well, yes.

JOHN BAKER, the defendant, sworn as a witness on his own behalf, testifies as follows:

Direct examination by Mr. Kalisch.

Q Do you understand English? A A little bit.

20 Q You are the defendant in this suit? A I am.

Q You own this machine? A Yes, sir.

Q When did you buy it? A Well, about two years ago.

Q Was it a new machine? A No, it was an old one.

Q What do you mean by that? A An old machine, an old machine, second hand.

30 Q How much did you pay for it? A Six hundred dollars.

Mr. Ward. I object to that.

Mr. Kalisch. I withdraw the question.

Q You did not drive the machine, did you? A No, sir, never.

Q Where do you live? A I got a business in Mercer street and live on Erie street and Paulison avenue.

40 Q Where is your store? A On Mercer street.

Anna Baker, direct.

Q What kind of a store have you got? A
A little baker shop.

Cross examination by Mr. Ward.

Q You have two homes then?

Mr. Kalisch. He did not say that. I
object. 10

Objection overruled; defendant excepts.

Q You have two homes, haven't you? A
Well, my sister-in-law lives in one and I got a
store downstairs.

Q But you own both homes?

Mr. Kalisch. Objected to.

Objection sustained; plaintiff excepts.

Q Have you two homes or not? A One.

Q One? A Yes. Paulison avenue. 20

Q And then you also have a place where you
sometimes live over your baker store? A I
keep a baker store down on Mercer street.

Q And this automobile is a large touring
car, is it not? A An old one.

Q A large one though? A Oh, well—

Q Yes, or no, now? A An old one.

Q You know what "large" means, don't you?

The Court. Big? 30

A Big, yes, a big car.

Q Do you know how much it weighs? A
Well, I don't know.

ANNA BAKER, sworn as a witness on behalf
of the defendant, testifies as follows:

Direct examination by Mr. Kalisch.

Q You are the wife of John Baker? A Yes,
sir. 40

Joseph Roth, direct.

Q Were you home on the first of November around five o'clock? A Yes, sir.

Q Were you there when your daughter left?
A I was home, I lit the lights on the automobile myself, I helped her to light the gas.

10 Q You put the lights on the machine? A Yes, sir.

Q What lights did you light? A Both electric and kerosene.

Q Do you know what time of the day that was about? A It was about ten minutes to six.

No cross examination.

JOSEPH ROTH, sworn as a witness on behalf of the defendant, testifies as follows:

20 *Direct examination by Mr. Kalisch.*

Q Where do you live? A Number one hundred and twenty-eight Second street, corner of Mercer, Passaic.

Q Did you see this Baker machine on the day of this accident? A Yes, sir.

Q What time about? A Just when she started out from the place.

30 Q What time was that about? A A few minutes to six.

Q Will you tell the jury whether the lights were burning on the machine or not? A Yes, I made on my lights in the front of my store and I saw Miss Baker passing by the drug store.

Mr. Ward. I don't think there is any dispute as to the side lights being lit.

Mr. Kalisch. One of your witnesses said they were not.

40 *Mr. Ward.* He said he did not see any. I don't think there is any dispute as to that.

John Crawbuck, direct.

Our contention has been that there were no headlights lit.

Q What did you see? A I saw the front and back lights of the automobile lit.

Q Can you state whether or not it was light or dark at that time? A It was dark. Because, otherwise, I would not make on my outside light. 10

Q Were the street lights lit? A Yes, sir.

No cross examination.

JOHN CRAWBUCK, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kalisch.

Q You are connected with the Passaic police force? A Yes, sir. 20

Q What are you, a patrolman? A Patrolman, yes, sir.

Q Did you come to the scene of this accident at the time of the accident on the first of November? A Yes, sir.

Q What time did you get there? A We were notified at the station house at 5:55.

Q Did you go right there? A Yes, sir.

Q Did you see the injured man? A Yes, sir. 30

Q What did you do with him? A We looked over him first to see whether he was really alive or not and he was, so Officer Soper who was with me at the time, he was taking the blanket off of the man and we went around and got names, and there was not very many people there, there was only two or three men there, and I got three children, ages eight, nine and ten, who saw the accident, and marked their names down. 40

John Crawbuck, direct.

Mr. Ward. I ask that that statement "who saw the accident" be stricken out.

The Witness. I did not see the accident.

The Court. Yes, that will be stricken out.

10 Q Did you see that man there, Mr. Pruzansky? A That man was not there, because if he was he would have given us his name, we could have the man's name.

Mr. Ward. I object to that statement and ask that it be stricken out.

Motion granted.

Q Can you say whether there were lights burning on the machine? A Yes, sir.

20 Q What lights were burning? A The side lights and the tail light, of course.

Q How far was the machine away from the body, where the man was lying, do you know?

A I should say four or five feet at the most.

Q Is there an arc light right there? A At the top of the hill, yes, sir.

Q Which way was the machine facing? A It was facing towards the top of the hill.

30 Q How far away is the top of the hill from this point where the man was lying? A On a straight line it would be about a hundred and fifty feet.

Q Is the arc light you say at the top of the hill? A Yes, sir.

Q That would be about a hundred and fifty feet away? A That would be about a hundred and fifty feet away, yes, sir.

Q Can you say whether or not that arc light threw light down to where this man was lying?

40 A Why, no, it was pitch dark there.

John Crawbuck, cross.

Q Did you notice whether this man had any overalls on or not? A He did not.

Cross examination by Mr. Ward.

Q It was pitch dark there? A Yes, sir.

Q It was so dark that you could not see your hand before your face, I presume? A 10
Oh, no, it was not as dark as that.

Q What do you mean by pitch dark? A I could not see the man there when we came.

Q What do you mean by pitch dark? A I mean good and dark, yes, that is what I mean, that you could not recognize the man, you could not recognize a man if you did not know who he is, that is what I should say was pitch dark.

Q So that it was so dark there that if you 20
passed a man on the street you could not recognize him? A Why, no, you could not.

Q Right next to him on the street? A I don't say shoulder to shoulder, but I say within about five or six feet.

Q In five or six feet you could not recognize him? A No, sir.

Q Do you know what time the sun set on that day? A I should say about five o'clock. 30

Q How do you know that? A Why, I just say it would be about five o'clock from what I remember of that time.

Q From what you remember? A Yes, sir.

Q Do you know what time it sets now? A Why, yes.

Q What time? A Why, 5:30.

Q Don't you know it sets at six o'clock now.

A Well, it may be six o'clock.

Mr. Kalisch. Is that material?

John Crawbuck, cross.

The Court. Yes, that is proper cross examination.

Q Don't you know that? A All right, say six o'clock then, but 5:30 is what I should judge that it would be.

10 Q How many times have you talked this matter over? A What, this here?

Q Yes? A I never said one word of it until here, until I am here now.

Q This is the first time you have ever talked is over? A Yes, sir.

Q How far is your station house from the place where this accident happened? A Do you mean in feet or blocks?

Q In distance? A I should say about a third of a mile.

20 Q You don't know when this accident happened, do you? A No, we just got notified and I was told to go right down there, there was a man injured.

Q How did you go down? A I went down on the patrol ambulance.

Q In what? A In the patrol wagon; or, in other words, we call it an ambulance.

30 Q When you got down there then you took the names of people around? A I did not, I went right for the man first.

Q You did, eh? A Yes, sir.

Q How long were you around the man there? A I was around the man about two minutes till Officer Soper came over to him and I told him to take care of the man while I went and got the names of witnesses.

Q What names did you take? A I took three names of three children.

40 Q What? A Agnes Dunkle, 60 Jefferson street, age eight.

John Crawbuck, cross.

Q Who else? A Stanley Nyas, 49 Jefferson street, age nine.

Q Anyone else? A Alexander Dyer, 61 Jefferson street, aged ten.

Q Have you got this boy's name here (indicating a boy in the court room)? A No, sir

Q He was there, wasn't he? A What is his name? I will tell you whether I got him or not. 10

Q Do you recognize him? A No, I do not recognize him.

Q Then you did not get his name? A I can tell you if I get his name, I can tell you if I took his name or not if I can hear it now.

Q Have you got his name or not, tell me? A It is according to whether I know him or not, I don't know. 20

Q Have you got Mr. Abbott's name? A If he was there I would have got his name if he wanted to give it to me as a witness.

Q The boy I showed you is Briscoe, have you got his name? A If he was there I would have got his name.

Q I simply want an answer to the question. Did you get Mr. Abbott's name? A I did not, no. 30

Q Did you see Mr. Abbott there? A I don't know the man.

Q You were in court here this morning, weren't you? A I was not.

Q You were not in court? A No, sir.

Q Did you get the names of the two women, Miss Saalbach and Miss Thompson? A I did not.

Q You did not get their names? A No, sir. 40

John Crawbuck, cross.

Q You did not see them there? A I don't know them, I would not know them if I seen them.

Q It was pitch dark there, do you mean to say there was no twilight at that time? A No, sir, it was not. It was dark.

10 Q Do you know that the twilight at that time lasted until 6:29 at night?

Mr. Kalisch. I object to that.

Objection overruled; defendant excepts.

A No, I do not, no, sir.

Q You do not know that? A No, sir.

Q Do you now say that there was not any twilight there at all? A Yes, sir.

Q And you are sure of that? A Yes, sir.

20 Q There is a vacant lot at the corner of Hope avenue and Jefferson street, isn't there? A On the right hand side, yes, sir.

Q Which right hand side, now? With reference to the points of the compass, where is it?

A Going west, yes, on the right hand side, the northeast corner is a vacant lot.

Q The northeast corner is a vacant lot? A Yes, sir.

30 Q How long is that vacant space there? A About a hundred feet.

Q That is, from the corner to the first building? A Yes, sir.

Q Don't you know that it is only twenty five feet? A Well, I say about a hundred feet, I did not take no tape measure to it.

Q What is next to it? A A big house.

40 Q What is the space in front of this house? It is a double house? A Yes, it is a double house and I should say it took up about thirty-five feet.

John Crawbuck, cross.

Q Don't you know that the space in front of the double house is larger than the vacant space from the corner down to the double house? A It don't seem to be that to me if I remember right.

Q How near to this building was this man lying? A What do you mean, the building? 10

Q The double house? A I should say about twenty feet.

Q From what part of it? A The nearest part of the house.

Q From the nearest part of the house? A Yes, if you were to mark a line out to the middle of the road, I should say that the distance from that mark to the man's body was about twenty feet.

Q That is twenty feet which side of the house? A I don't quite understand how you mean that? Do you want the measurement right off straight to the road? 20

Q I mean, if you take the place where the man's body was lying and run a straight line to the house, at right angles across the sidewalk— A To the house?

Q Across the sidewalk? A Yes, sir.

Q How far would that straight line be from the house? A I said twenty feet. 30

Q In which direction? A On the west, to the house.

Q You mean the house would be west of the man or the man would be west of the house?

A The house would be west of the man.

Q Which is it? A West of the man.

Q Are you sure of that? A Yes, sir.

Q Now, just think for one moment and let me ask you again if you don't know that that lot on the corner is only twenty feet on Jef- 40

John Crawbuck, cross.

ferson street, that vacant lot? A I say it is, but what I remember, I did not take nothing to measure with there, it may be twenty-five or anything like that, I don't know, all I say is what I remember, it would be about a hundred feet from the centre of Hope avenue in.

10 Q What kind of a light is there on the corner there? A An arc light.

Q What kind of a store is there across the street? A Just a small store.

Q A small store? A Yes, sir.

Q What is the frontage of it? A It is right on the corner, I should say about twenty five feet, the store frontage, it is right on the corner there.

20 Q Then it is twenty-five feet on Jefferson street? A I should say about that.

Q With a twenty-five foot window on Jefferson street? A It is not all window.

Q There are lights in the window? A There is one light in the window there, dim, very dim light that night.

Q And only one? A Yes, sir.

Q And I suppose the arc light on the corner was very dim? A The arc light was the same as usual, a bright light.

30 Q And you mean to tell us that from the distance you say on that street where that body was lying that there was not any light from that arc light? A No, sir, there was not, it was very dark there at that spot.

40 Q And you mean to tell us that that arc light being there and with the situation as you have described it there, with the lights across the street and in the store, and another store on the right hand side, on the same side as the body lay, with lights in the window there and the arc

Richard Soper, direct.

light, that it was pitch dark there? A The light was not bright in the store, because I had to turn around to the arc light to mark my book.

Q You mean to tell us it was pitch dark there? A It was at that spot, yes, sir.

10

RICHARD SOPER, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kalisch.

Q You are a member of the Passaic police force? A Yes, sir.

Q How long have you been such? A For five years.

Q What position did you hold on the police force in November, 1916? A Chauffeur on the patrol wagon, ambulance.

20

Q Did you come to the point of this accident on that day? A Yes, sir.

Q What time was it about when you got there? A At 5:55 we got the call and we went right up.

Q Can you tell the Court and jury whether it was light or dark there? A It was quite dark.

Q Were the street lights burning? A Yes, sir.

30

Q At this point where this man lay was it light or dark? A It was dark.

Q Is there an arc light right at that point? A No, sir, at the nearest corner.

Q Where is the nearest corner? How far away? A I should judge a hundred and twenty-five or a hundred and fifty feet.

Q Is it on a level or up hill? A It is up hill.

40

Richard Soper, cross.

Q And you say that is where the man lay, about a hundred and twenty-five or a hundred and fifty feet? A Yes, sir.

Q How far to the rear of the machine did he lay? A I guess about five feet away from him, four or five feet.

10 Q Did you notice whether the lights were lit on the machine? A Yes, sir; there was two side lights and the tail light was lit. Otherwise we would have placed them under arrest.

Q How far was the man lying from the sidewalk? A Right near the curb.

Q Which way was the machine facing? A Towards Main avenue.

Q Does Main avenue run at right angles to Jefferson street? A It runs right across.

20 Q Did you see this man Pruzansky there at the time of the accident? A No, sir.

Q Who were the people who were there?

Mr. Ward. I object to the employment of the term "who were there at the time of the accident." The officer was not there at the time of the accident.

Mr. Kalisch. Immediately after the accident.

30 *The Court.* I will let him state what he knows.

Q Did you see that man there when you arrived after the accident? A I don't remember him, no.

Cross examination by Mr. Ward.

Q Did you see two women there? A Well, there was four or five women there.

40 Q Did you see Miss Thompson there? A I don't know Miss Thompson.

Lena Saper, direct.

Q Did you see Mr. Abbott there? A No, sir.

Q Did you see this lady there, Miss Saalbach? A I don't know her.

Q Did you see this little boy there (indicating the former witness Briscoe)? A Well, I cannot remember him now. 10

Q Your memory is not very good about that, is it, who you saw there? A Well, we inquired, we got there and we inquired who seen it and we got names of three little boys that seen the accident, we got three names. The rest of them did not know anything about it.

Q Your memory is not very good about what you saw there? A Well, as good as anybody's, I guess.

Q Did you see this woman here there, Mrs. Chintala? A Yes, sir. 20

DEFENDANT RESTS.

LENA SAPER, recalled as a witness on behalf of the plaintiff in rebuttal, testifies as follows:

Q Did you see your father when he went out that day? A Yes, sir, I did.

Q What kind of clothes did he have on? A Painters' overalls. 30

Q What color were they? A They were white, a little yellowish shade, but white, maybe a little yellowish.

Q Were you at home when he was brought back to the house? A Yes, sir.

Q Was he dead or alive? A He was dead.

Q Was he dressed or not? A He was wearing his overalls.

Q What did he have on at that time? A The overalls. 40

Fannie Saper, direct.

Q The same overalls? A Yes, sir.

Q Were they light or dark? A They were light but they were a little dirty, maybe from new paint.

Q I know, but as to the general color, what would you say, light or dark? A Light.

10 *Cross examination by Mr. Kalisch.*

Q What did you father go out for that morning? A What did he go out for?

Q Yes? A He had to get something.

Q What did he have to get? A We were short in coal at that time and it was cold, our house was very cold, so my mother said she would need some coal for tonight and he went and got some coal.

20 Q He went and got some coal and wood? A No wood, only coal.

Q You saw the white overalls? A Yes, sir.

Q You say he wore white overalls? A Yes, sir.

Q Where are those? A We have thrown them away. We do not keep them. We took them off when he was dead and they took it all out together that time.

30 FANNIE SAPER, recalled as a witness on behalf of the plaintiff in rebuttal, testifies as follows:

Q When your husband was brought back to your house dead, what kind of clothing did he have on? A Overalls.

Q Overalls? A Yes, sir, like coming from work.

Charge to Jury.

Q Were they black or light? A They light, they were paint overalls, that is light.

No cross examination.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

10

Mr. Kalisch. I move for the direction of a verdict in favor of the defendant on the same grounds as the motion for a non-suit.

Motion denied; defendant excepts.

Exception noted as ground of appeal.

The court thereupon adjourned to tomorrow, March ninth, 1917, at 10:00 o'clock A. M.

20

THIRD DAY

Paterson, N. J., March 9, 1917.

The trial was resumed this day pursuant to adjournment.

(Mr. Kalisch sums up for the defendant.)

(Mr. Ward sums up for the plaintiff.)

Charge to Jury.

30

The Court then charged the jury as follows:

The Court. Gentlemen of the jury, on the first day of November, 1916, about five minutes of six, Louis Saper was killed by coming in contact with the automobile of the defendant, which was being driven by his daughter, Lillian. And the widow of Mr. Saper now brings suit to recover damages for the benefit of herself and next of kin, which is the daughter. 40

Charge to Jury.

The suit is based on our death act, which provides that suit may be brought for the benefit of the widow and next of kin in a case of this kind for the wrongful act or neglect which caused the death of this man.

10 Your first question, gentlemen, is, to determine whether there was neglect on the part of the defendant, acting through his daughter, who was running the car. You will observe that this was a public street and that both parties had a right to be where they were. The deceased had a right to be on the public street propelling his wheelbarrow along, and Miss Baker had a right to be where she was, on the street, driving the car, and, in that situation, it was the duty of each one of them to exercise reasonable care for his own safety and for the safety of those who were using the street at the same time.

20 The plaintiff says that Miss Baker was negligent in the operation of the car, that she did not exercise that reasonable care which she should. And that is the question for you to determine. Did she exercise reasonable care?

30 The testimony on the part of the plaintiff seems to be that as this man was walking down the street, Miss Baker ran her car into the back of this man and knocked him down, killing him. Of course, it was not intentionally done. There is no doubt about that. But, was it done negligently?

40 A person who uses the street with an automobile, or any other vehicle, must exercise care; and, if there is a man walking along the street in front of that automobile, the person driving the car must exercise care not to run into that person if it can be avoided. In this case Miss

Charge to Jury.

Baker says she did not see the man at all until she was within two feet of him. And it is very refreshing in this case, gentlemen, to hear Miss Baker, in giving her testimony, not try to avoid any responsibility, but coming here and telling her story as she sees it. Too frequently in these cases we see people going upon the stand and trying to avoid responsibility by lying. In this case she goes upon the stand and tells us just as she sees it, irrespective of what the responsibility may be. She says she did not see the man until she was two feet from him. Was she exercising care, gentlemen? If she did not see that man who was upon the public street till she got within two feet of him? Why didn't she see him? If there was light and she could have seen him, should she not have seen him before she ran into him? If there was light there, so she could see for a long distance, wasn't it her duty to look and to so run and control her machine that she would not run into someone? And, if it was so dark that she could not see, wasn't it at the same time, her duty to so control her machine that she would not run into a dark place where a man might happen to be and kill him?

So the question is, was she exercising care, the care that a reasonable person would at that place? If she was, then, of course, there cannot be any recovery in this case. But, if she was not, then, of course, the defendant, acting through her, is guilty of negligence and the plaintiff may recover.

You may also consider, gentlemen, whether there was any contributory negligence on the part of the deceased. I cannot recall myself, any testimony in the case which shows that the

Charge to Jury.

deceased did anything which was careless or negligent or contributed to the accident.

Now, if you find that the defendant was guilty of negligence, then, of course, you come to the question of damages.

10 As counsel has well said, in this case, there can be no recovery in a case of this kind for sentiment or sympathy, pain and suffering or anything of that kind. Our statute puts the matter on a very cold-blooded basis. But, of course, that is the basis that we have to accept. But the only recovery that is permitted is compensation for the pecuniary loss, the money loss. That is all. This is the way the statute reads:

20 "The jury may give such damages as they shall deem fair and just with reference to the pecuniary injury—that is, the money injury—resulting from the death, to the wife and next of kin of the deceased."

30 So, if you come to the question of damages, the question is, what is the money loss to the widow and the daughter by reason of the death of this man? Of course, the man might have died the next day. Or, he might have lived a great many years. The wife might have died or she might have lived for a great many years. The daughter might have died the next day. The man might have had financial reverses. All of these things are circumstances, which you must, of course, consider, and it is not a matter which can be easily solved, because this is something to which you must apply your good common sense, that is all. Because you have got to determine, in your minds, what is just and fair.

40 Of course, you must also bear in mind that whatever sum is awarded now would be in lieu of what the father would bring in over a period

Charge to Jury.

of a number of years while he was supporting them, so that you would be giving them now a lump sum instead of the father giving it from year to year as they went along, so that you give the present value of the loss, and, the Supreme Court has put it in this way:

“What the plaintiff is entitled to recover 10
is a capital fund, so to speak, which shall represent the present value of all the pecuniary loss which will fall upon the widow and next of kin by the premature taking off of the intestate. That fund is to be ascertained by taking into account all the possibilities. The intestate might have died in the course of nature shortly after the accident, and he might, had he lived, have suffered financial reverses. The wife, had he 20
lived, might have died long before he did. So might his next of kin. And nothing is to be added for loss of society or wounded feelings or anything which cannot be measured by money and satisfied by pecuniary recompense.”

So, take the case, gentlemen, and determine, first, was there negligence on the part of the defendant, acting through the driver of the car? 30
If there was, and there was no contributory negligence, then you take up the question of damages, and you will, if you come to that, award such sum, under the instructions that I have given to you, in the way the statute says, such sum as shall be fair and just. That is, after all, the test. So take the case, gentlemen, and return your verdict as you shall find the truth to be.

Are there any exceptions?

Charge to Jury.

Mr. Kalisch. I ask an exception to that part of the Court's charge wherein the Court says that it could not find any evidence of contributory negligence on the part of the deceased. The point being that that is a question for the jury and not for the Court.

10 *The Court.* I agree that it is for the jury to determine. And I think I merely said that I did not recall any evidence of contributory negligence. But it is for the jury to find.

Mr. Kalisch. It is a question for the jury and not for the Court.

The Court. Are there any of your requests which I have not covered?

Mr. Kalisch. You have not charged the requests.

20 *The Court.* I am just reminded, gentlemen, that counsel has handed me some requests to charge:

1. The mere fact that the automobile ran into the deceased on Jefferson street, Passaic, does not convict the defendant of negligence.

I so charge you.

30 2. The fact that the defendant did not have her headlights burning on the machine, did not charge this defendant with negligence, since it was only necessary under the law to have the side lights burning, and the jury cannot find this defendant guilty of negligence because she did not have the headlights burning.

I so charge you.

40 3. If the deceased suddenly and without any notice to the defendant, placed himself in a position of danger and the defendant did everything in her power to avoid striking the deceased,

Charge to Jury.

then in that case the defendant cannot be guilty of negligence.

I so charge you, gentlemen, but I do not recall personally, as I said to you before, any evidence that the man suddenly put himself in that position. Of course, if you find such evidence then you may apply the facts as you find them.

10

4. The burden of proving negligence is upon the plaintiff and he must bear that burden throughout the entire case, and if at the end of the case the minds of the jurors is in equipoise, the verdict must be for the defendant.

I so charge you.

The jury then retire.

(The jury after deliberating for a considerable time, sent a communication to the Court stating that they wished to ask for information. They were accordingly ushered into Court and polled, and,

20

The Court. Gentlemen, you have a question to ask?

The Foreman. The gentlemen wish to find out whether a wheelbarrow is supposed to have a light on?

The Court. A wheelbarrow is not obliged by the law to have a light under the conditions here disclosed, and the man is not obliged to carry a light either.

30

(The jury again retire.)

40

Notice of Appeal.

Notice of Appeal.

Filed April 24, 1917.

PASSAIC COUNTY CIRCUIT COURT

10 FANNY SAPER, Admr. etc., of
Louis Saper, deceased,
Plaintiff-Appellee,

vs.

JOHN BAKER,
Defendant-Appellant.

*Action at
Law.*

*Notice of
Appeal.*

20 *To Ward & McGinnis, Esqs., Attorneys for
Plaintiff-Appellee.*

Sirs: PLEASE TAKE NOTICE, that the defend-
ant-appellant appeals from the entire judgment
entered in the Passaic County Circuit Court in
the above matter, to the New Jersey Court of
Errors and Appeals.

Respectfully yours,

30 KALISCH & KALISCH,
Attys. of Defendant-Appellant.

Dated March 30th, A. D. 1917.

Reasons.

Reasons.

Filed April 24, 1917.

PASSAIC COUNTY CIRCUIT COURT.

<p>FANNY SAPER, Admrx. etc., of Louis Saper, deceased, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>JOHN BAKER, <i>Defendant-Appellant.</i></p>	}	<p>10</p> <p><i>On Appeal.</i></p> <p><i>Reasons.</i></p>
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*To Ward & McGinnis, Esqs., Attorneys for
 Plaintiff-Appellee.* 20

Sirs: PLEASE TAKE NOTICE, that the following are the Reasons on which the appeal in the above matter is based:

1. Because the trial Court erroneously and improperly denied appellant's motion for a non-suit at the close of the plaintiff-appellee's case.

2. Because the trial Court, at the close of the entire case, erroneously and improperly denied the appellant's motion to direct a verdict in favor of the defendant. 30

3. Because the trial Court erroneously and improperly charged the jury as follows:

"I cannot recall myself, any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident."

Reasons.

4. Because the trial Court, upon being asked by a juror, the following question:

“Whether a wheelbarrow is supposed to have a light on,”

erroneously and improperly answered the question in the following manner:

10

“A wheelbarrow is not obliged by the law to have a light under the conditions here disclosed, and the man is not obliged to carry a light either.”

Respectfully yours,

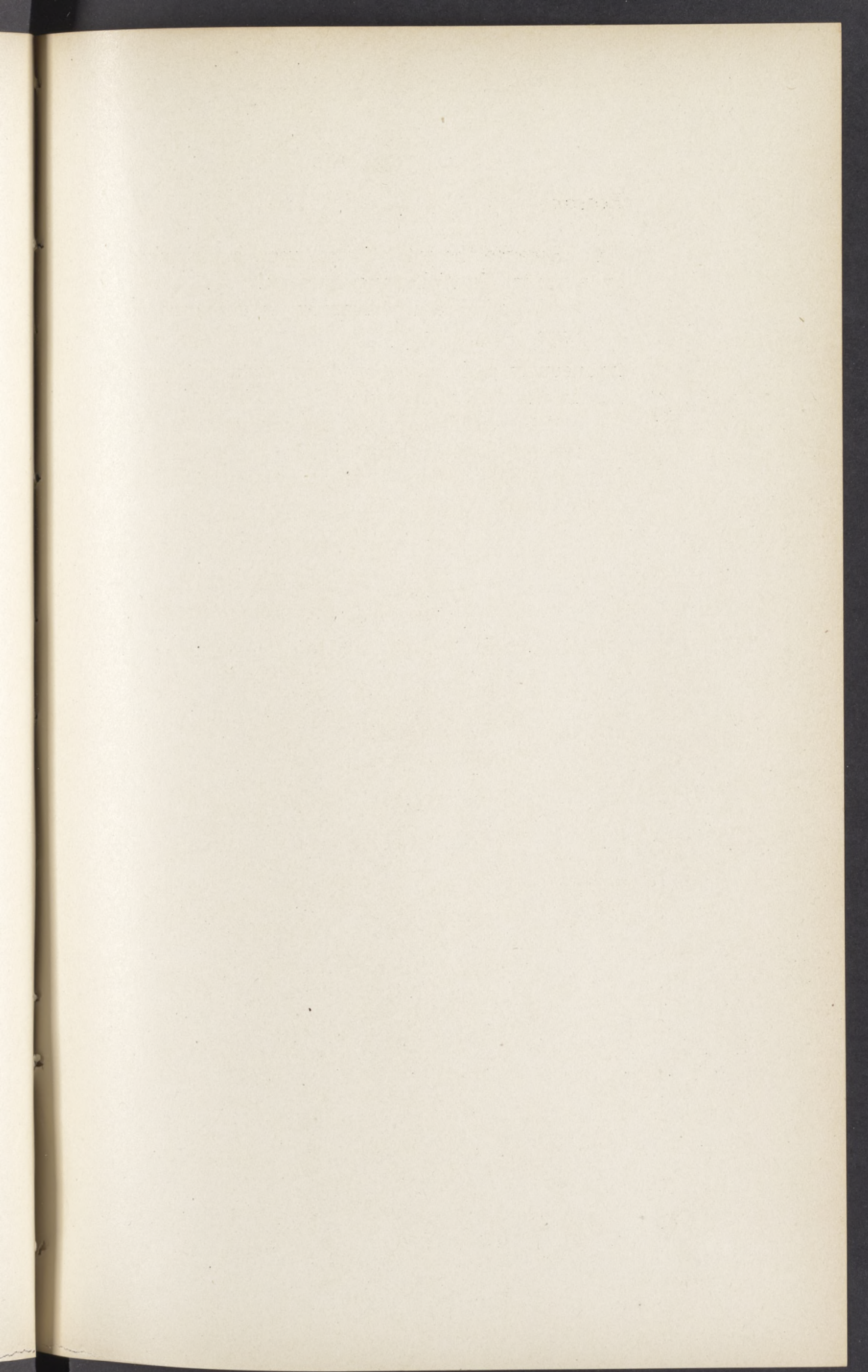
KALISCH & KALISCH,
Attorneys of Defendant-Appellant.

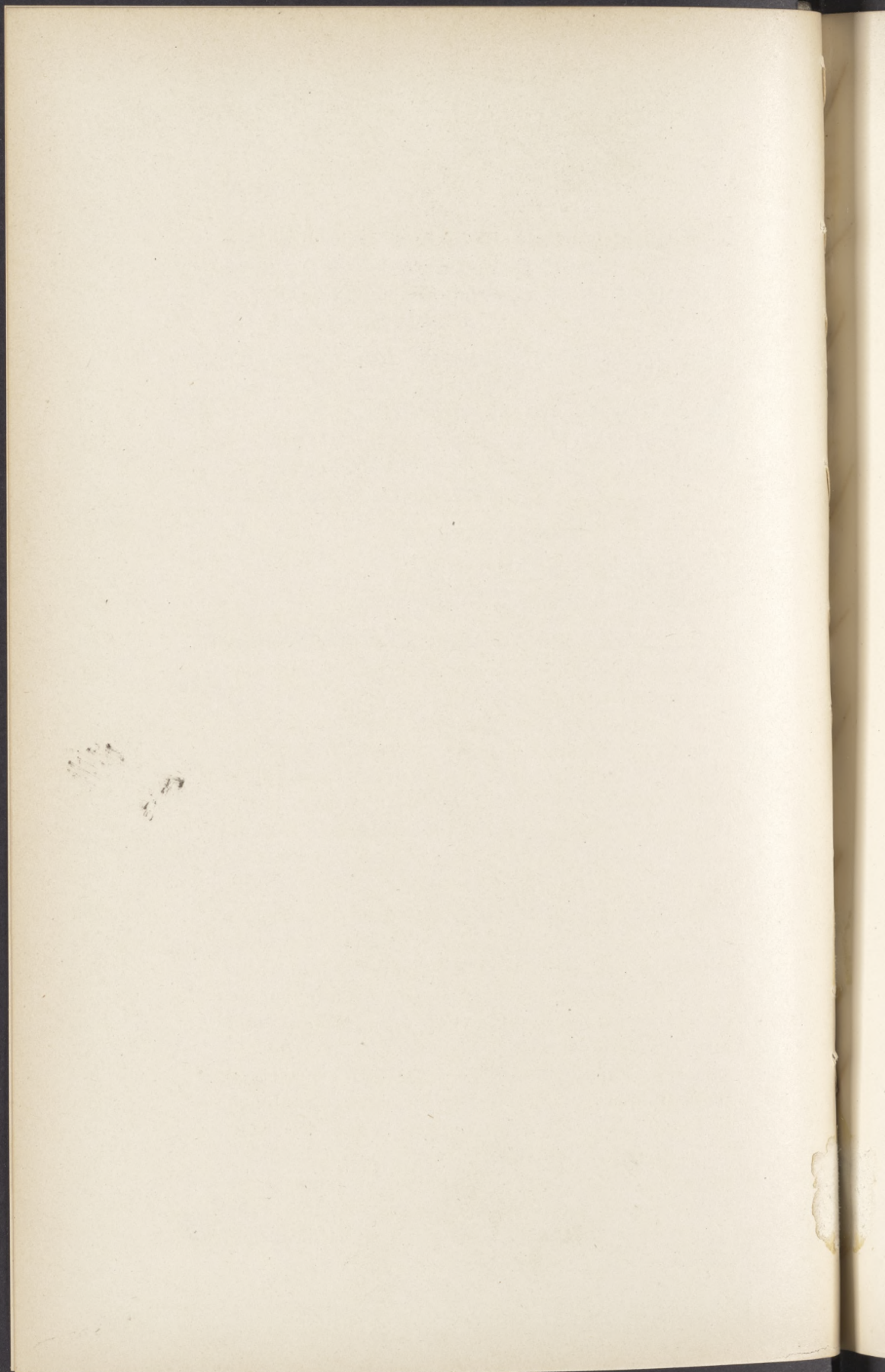
Dated April 12, 1917.

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New Jersey Court of Errors and Appeals

FANNY SAPER, Administratrix,
&c., of Louis Saper, de-
ceased,

Plaintiff-Respondent,

vs.

JOHN BAKER,

Defendant-Appellant.

*Action at
Law.*

On Appeal.

Brief.

This was an action brought by Fanny Saper, as administratrix of the estate of Louis Saper, her husband, against John Baker, for damages because, as she alleges, the defendant carelessly and negligently ran into and against the deceased, her husband, on November first, 1916, while he was pushing a wheelbarrow along Jefferson street, a public street or highway in the City of Passaic, and as the result of the injuries so sustained, he died. There was a verdict rendered for the plaintiff.

As the plaintiff's action was based upon the negligence of the defendant, it was incumbent upon plaintiff to show that the defendant carelessly and negligently drove her machine along Jefferson street, in the City of Passaic, and into and against the deceased, and in order to sustain that burden the plaintiff produced the following witnesses: Alice Saalbach testified on cross examination (page 43, lines 8-15) that it was a dark November day and a little bit foggy, and on the same page, lines 16-20, on further cross examination, that the lights were lit in the street. She further tes-

tified that she was walking home with a companion, and that she had reached the intersection of Hope avenue and Jefferson street, and that the automobile passed her when she was about ninety feet from Hope avenue on Jefferson street and that she did not notice whether the automobile had any lights on it or not (page 43, lines 29-36; page 44, lines 15-20). That she did not see the accident, but she saw the deceased lying in the roadway, and further, that she did not hear the horn of the automobile and that the horn was not blowing when it passed her (page 45, lines 30-40), although on the same page at lines 23-26 she testified that she heard the automobile and saw it pass her. She also testified on cross examination (page 47, lines 32-35), that the first she saw of the man was when he was lying in the street and that she did not see him before.

Another witness produced on the part of the plaintiff, Mary Thompson, testified that she was walking along Jefferson street, Passaic, with Miss Saalbach, and that the first she knew about the accident was when a girl told her that a man was struck by an automobile (page 48, lines 30-35). That upon being given this information she turned back (page 40, lines 10-12) and saw the man lying in the road about three or four feet from the gutter and also saw a smashed wheelbarrow lying in the street. She further testified on cross examination (page 52, lines 1-9), that the lights were lit in the street and that it was dark. On page 52, lines 30-32, she testified that she guessed the tail-light on the automobile was burning. She also testified that she did not see this man before the accident (page 53, lines 28-30), although she must have passed within four or five feet of him.

Morris Abbott, a witness produced on the part of the plaintiff, testified on cross examination that the man was lying about 49 feet from the corner of Hope avenue on Jefferson street (page 58, lines 30-40).

Harry Prazansky, a witness produced on the part of the plaintiff, was the only witness who claimed that he saw the accident, and testified on page 63, lines 21-40 on cross examination, that the deceased was walking on Jefferson street, the right side, toward Hope avenue pushing a wheelbarrow and that he was about four or five feet from the curb; that the deceased was about sixty or sixty-five feet from the corner of Hope avenue and Jefferson street at the time of the accident. And on cross examination (page 64, lines 1-15), testified that the automobile passed him on the right side of the road and that the deceased was on the right side and that the automobile did not give any warning and that the front part of the automobile struck the man, that it was about five minutes to six in the evening. He further testified on cross examination (page 70, lines 9-12), that he saw the tail light of the machine as it passed him and that he noticed the deceased on the street and that he was wheeling a wheelbarrow, and that he was not on the sidewalk (page 74, lines 10-22).

So that when the plaintiff's case rested we have this state of facts, that the deceased was pushing a wheelbarrow in the roadway four or five feet from the curb on Jefferson street, in the City of Passaic, and that it was about six o'clock in the evening of November first, quite dark and a little foggy, and that the defendant did not give any warning of her approach but ran into and against the deceased when he, the deceased, was about sixty-five feet

from the corner of Hope avenue on Jefferson street, and that the automobile was going quite fast and that the deceased was four or five feet from the curb at the time he was struck. Under these state of facts, defendant moved for a non-suit on the ground that no negligence had been shown on the part of the defendant and contributory negligence had been shown on the part of the deceased (page 88, lines 12-22). These motions were denied and in the denial of these motions we claim the Court erred.

It is admitted that the street lights were lit and that it was dark and a little foggy. There was some dispute on the plaintiff's case as to whether the lights were burning on the automobile, but Harry Prazansky testified that he saw the tail-light on the machine burning as it passed him. And counsel for the plaintiff admitted that the side lights of the machine were lit, but contended that the headlights were not lit (page 112, lines 30-40).

As was said in the case of *Buttelli v. Electric Ry Co.*, 59 N. J. L., page 303 at page 305:

“As the highway is laid out for passage, each passer, whether in vehicles or on foot, has a right of passage, subject only to the condition that he does not unnecessarily and improperly interfere with such use by others as they are entitled to.”

So in the case at bar the defendant had the right to be where she was, and the deceased had the same right “subject only to the condition that he does not unnecessarily and improperly interfere with such use by others as they are entitled to.”

Jefferson street in Passaic was an improved street with a smooth pavement (page 59, lines 8-18), having sidewalks set aside for foot pas-

sengers. Since, therefore, Jefferson street had sidewalks set aside for foot passengers the defendant had no reason to suppose and was not warned in any way whatever that the deceased was using the road set aside for vehicles for his own purposes, and as it was dark and slightly foggy and the deceased was not at a crosswalk, she had no reason to suppose that she would meet with a foot passenger in the middle of a block walking in the roadway.

It would seem, therefore, that if the deceased wished to use the roadway instead of the sidewalk for pushing a wheelbarrow, by analogy he ought to have used the same degree of care that the statute requires of horse-drawn vehicles between the hours of sunset and sunrise.

Road Act, p. 1470, Chap. 92a.

Referring to the Buttelli case, the Court said:

“The foot passenger on a highway has doubtless the right to use any part thereof. Whether his use is one which a prudent man would make, must depend upon circumstances. When a certain portion of the highway is paved as a sidewalk or otherwise set apart as a path for foot passengers, it may not be prudent to walk in the roadway set apart for vehicles.”

The defendant, under the conditions above recited, had no reason to believe that foot passengers would be in the roadway at a point in the middle of a block and consequently drove her automobile along Jefferson street with the assumption that it was incumbent upon her to use care with regard to other vehicles which might be using the roadway at the same time. There was nothing in the testimony of the defendant or her witnesses which ~~did~~ justify the Court in leaving the question of the defendant's

negligence to the jury. The defendant testified (page 91, lines 23-25) that she was driving her automobile along Jefferson street when the deceased suddenly appeared to loom up before her and that he was then only two or three feet in front of the car and that defendant immediately turned her wheel to the left and the front part of the car did not strike the deceased, but it was the back that struck him. The defendant was then questioned by the Court (page 102, lines 9-19) as follows:

Q (*By the Court.*) How far could you see with those lights? A About ten feet ahead.

Q You did not see this man until you were there onto him, within three feet of him? A Yes, sir.

Q How is that? Were you looking forward then? A Certainly.

Q How is it you did not see this man before? A I don't know how it is.

Q He was right in front of you? A He could not have been in front of me all the time, or I surely would have seen him.

The defendant further testified that she was going about ten or eleven miles an hour and that she was about six feet from the curb when she struck him (page 102, lines 20-30), and the defendant insisted that if the deceased had been in front of the machine all the time she certainly would have seen him (page 102, ll. 30-33). She further testified to the facts that her two side lights and tail light were burning and that the side lights threw a radius of about ten feet ahead.

Mary Chintala, who was riding with the defendant, testified that it was dark about five

minutes to six and that the street lights were burning and that all the lights on the automobile were burning (page 105, lines 30-40). She further testified that the first she saw of the man was when he was about two feet ahead of the automobile, that the deceased did not carry a light on his wheelbarrow (p. 107, ll. 18-20) and that the defendant quickly turned her wheel (p. 126, ll. 12-32). Both witnesses testified to the effect that the horn was blown two or three times before the man was struck.

John Crawbuck, a witness produced on the part of the defendant, connected with the Passaic Police Force, testified on cross examination, that the point where the deceased was struck by the automobile it was pitch dark. In fact, so dark that you could not recognize the deceased if you did not know who he was (p. 115, ll. 10-20). So that it appears from the testimony of the defendant and her witnesses that when the defendant got within three feet of the deceased she immediately did everything in her power to avoid striking him.

The evidence of the defendant and her witnesses demonstrates that there was nothing which the defendant did or which she refrained from doing which was negligent and there is undisputed testimony that the actions of the deceased were negligent. The fact that the deceased walked in the roadway of Jefferson street when he could just as well have used the sidewalk set aside for foot passengers, without carrying a light or any other way to indicate his presence in the highway, shows that he had a reckless disregard for his own safety, and certainly was guilty of what the law terms contributory negligence.

In the Buttelli case the plaintiff was walking along a public road in Hudson County in broad daylight. There was no sidewalk or path on the side of the road and the plaintiff was obliged to walk in the road, and he was struck by a trolley car and injured and the Court held in that case that both the negligence of the defendant and the contributory negligence of the plaintiff were for the jury.

In the case of *Anderson v. Public Ser. Rwy. Co.*, 81 N. J. L., page 700, the plaintiff was walking over a public highway between Perth Amboy and Metuchen in daylight and there were no sidewalks or no defined foot paths over the highway. Plaintiff was struck by a trolley car going in the same direction in which he was walking and injured, and in that case the Court held that the negligence of the defendant and the contributory negligence of the plaintiff were for the jury. The Court will see that in both of these cases two very important elements existed, which are absent in the case under consideration, and those two elements are, that it was daylight at the time of the occurrence of the accident and also that there were no sidewalks and that the plaintiffs were obliged to use the public road set aside for vehicles, and that the defendants under those conditions were obliged to operate their cars over the highways above mentioned with due regard to that fact, namely, that the road was used by pedestrians as well as vehicles.

In the Buttelli case the Court expressly mentioned that fact at the bottom of page 305 in the following manner:

“It plainly results that where, as in this case, there was no sidewalk or sidepath prepared for foot passengers, plaintiff had a

right to walk upon any part of the highway.”

So that we contend that at the close of the defendant's case, the defendant was entitled to a verdict both on the ground of no negligence on her part and upon the ground of contributory negligence on the part of the plaintiff.

Our next ground of appeal is that the Court erroneously and improperly charged the jury as follows:

“I cannot recall myself, any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident.”

We realize that it is not error for the Trial Judge to give his opinion of the impression that the testimony makes upon his mind, so long as he leaves the decision of the questions in fact involved in the case to the jury, and we say, that in view of the facts above recited as to how this accident occurred, it is impossible for us to conceive how the Court could have told the jury that it could not see anything that the deceased did which was careless or negligent or contributed to the accident.

We would refer the Court to the case of *Chrisafides v. Brunswick Motor Co., et al.*, Vol. 100, Atl. Rep., page 196, wherein the Court, in charging the jury, said the following:

“It is very difficult for me to feel that there was no negligence; a car coming along at a fair rate of speed and turning a corner sharp, as he puts it, and a collision.”

And the Court in that case intimated that such a charge was error, but that it did not represent all that the Trial Judge said in that connection, and that in the final analysis the

Court left it to the jury to ~~see~~^{say} whether or not the driver of the machine was negligent. But in the case under consideration the Court did not cure the error which we allege he made in his charge, by adding anything thereafter. Of course, if the Trial Court had told the jury, as was said in the case of *Merklinger v. Lambert*, 76 N. J. L., page 807, that it was for them to say whether or not under the facts and circumstances disclosed in the case, the deceased did anything which was careless or negligent, which contributed to the accident, that would have cured the alleged error, but nothing was thereafter added to the charge, and it therefore, was not a proper comment upon the testimony. It was practically a statement by the Trial Judge to the jury that there was no testimony in the case from which the jury could reasonably infer that the plaintiff was guilty of contributory negligence. It is to be noticed that the Judge told the jury that he did not recall any testimony in the case which showed that the deceased did anything which was careless or negligent, or contributed to the accident. This was equivalent to instructing the jury that the testimony as the Judge recalled it, showed that the deceased did nothing which was careless or negligent or contributed to the injury. This was prejudicial and misleading. The Trial Court did not leave it to the jury to find whether there was any testimony from which they could find that the deceased was guilty of contributory negligence, and in fact, told the jury that from the facts as developed in the case, there was nothing which the deceased did which would charge him with contributory negligence.

Another ground for appeal is that the Court erroneously charged the jury upon being asked by a juror, the following question:

“Whether a wheelbarrow was supposed to have a light on.”

And the Court said:

“A wheelbarrow was not obliged by law to have a light under the conditions disclosed and the man is not obliged to carry a light either.”

If the Court will look at page 131, lines 18-23, it will notice that the jury had retired and after deliberating for a considerable length of time, sent a communication to the court stating that they wished further instruction. As a matter of fact they were deliberating for a period of about three hours, and in the meanwhile counsel returned to their office, and had no notice or knowledge that the jury wished the Court to give them further instruction. We understand the true doctrine to be that a court of appeals need not, not that it cannot, decide a question arising on a record before it, which was not raised in a court below. *Michael v. Horay, et al.* 100 Atl. page 205, at bottom of page 206. And especially ought the Court to consider this error, because when taken in conjunction with what the Court told the jury, to wit:

“I cannot recall myself any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident.”

To which exception was taken, ^{the} ~~The~~ Court will immediately see what was in the Trial Judge's mind at the time he delivered his charge to the jury, namely, that even though the deceased was walking in a public roadway in the

night time, without carrying a light to indicate his presence in the highway, where under the evidence there were sidewalks provided for the use of pedestrians, the jury could not conclude that under those conditions the deceased was guilty of contributory negligence.

We respectfully submit that for the errors occurring in the record the judgment be reversed and a new trial granted.

KALISCH & KALISCH,
Attorneys of Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

FANNY SAPER, Administratrix
&c., of LOUIS SAPER, Deceased.

Plaintiff-Respondent,

VS.

JOHN BAKER,

Defendant-Appellant.

Action at Law.

On Appeal.

Brief of Plaintiff-Respondent.

Statement of Facts.

Defendant seeks to reverse a judgment of the Passaic Circuit Court in favor of the plaintiff for \$4,000. The action grew out of the death of Louis Saper, a married man living with his wife and children, who in the early evening of November 1st, 1916 was killed by an automobile driven by a servant of defendant. The accident happened shortly before 6:00 o'clock on Jefferson Street in the City of Passaic. The deceased according to the admitted testimony was pushing a wheelbarrow along Jefferson Street on his right hand side in a westerly direction, and had not quite reached Hope avenue, which crossed Jefferson street. The automobile driven by the daughter of the defendant was driven in the same direction and approached the deceased from behind, and without warning knocked him down and ran over him, inflicting fatal injuries. At the intersection of Jefferson street with Hope avenue was a lighted arc light; and stores on the corners, all lighted, although it was not yet completely dark at the

moment of the accident. While several witnesses were produced on the part of the defendant only two actually attempted testifying as to how the accident happened, and they offered no explanation.

The defendant advances four grounds for a reversal of judgment viz., (1) the court's refusal to non-suit; (2) the court's refusal to direct a verdict; (3) a remark of the court as to what evidence he recalled; (4) the answer to a request of one of the jurors as to whether or not he law required the deceased to have a light on his wheel-barrow. On this last reason, no objection was raised at the time the juror asked the question, and the court answered same, and it therefore, cannot be considered on this appeal.

The brief of the defendant seems to be more in the nature of an attempt to argue the weight of the evidence and does not seem to counsel to show any serious effort to argue as a legal proposition that there was no evidence to justify the submission of the case to the jury. We shall take up the reasons in their order.

POINT I.

Motion for Non-Suit Was Properly Refused.

ALICE SHALBACH, a witness for the plaintiff, and whose testimony begins at page 38 testified that she was about the length of the court room away from the accident at the time it happened (P. 39 L. 3-6). This witness was on Jefferson street on the northerly side thereof, approaching Hope

avenue; she said she was half way between First street which was behind her and Hope avenue in front of her. She further indicated this distance as about one and one-half times the length of the court room (P. 40 L. 1-28). She placed the time of the accident at about two or three minutes before 6:00 o'clock in the evening (P. 40 L. 26-30). As she was walking along, she saw the automobile pass her going in the same direction as she was traveling; that the automobile was going fast; that as it passed her it gave no warning of any kind (P. 40 L. 30-40). The next thing she saw was the man lying in the gutter, and the automobile standing at a point about twenty feet beyond where the man lay. The man lay about three or four feet from the curb stone, and that the wheel-barrow lay there smashed to pieces (P. 41 L. 35-40).

On cross-examination this witness repeated that it was not quite dark, and that the street lights were lighted (P.47 L. 1-6); that there was a large lighted arc light on the corner of Jefferson street and Hope avenue (P.47 L.20-30). The automobile had not reached Hope avenue when the accident happened (P.46 L.23), and that at the moment of the accident when the automobile passed her and struck the deceased, she was from twenty-five to thirty feet away from him (P.47 L.10-20).

MARY THOMPSON, a witness for the plaintiff, testified that she was with Miss Saalbach, the previous witness, when the accident happened. This witness estimated that she and Miss Saalbach were about thirty to forty feet from Hope avenue approaching Hope avenue at the time the

accident happened (P. 48 L. 35-40). She saw the automobile pass, and heard no signals given by it as it passed (P. 49 L. 34-38). She fixed the time of the accident as about six minutes to six (P. 50 L. 38-40). She was then asked by a juror, whether it was dark at the time of the accident and her answer was, "Well, I don't know whether it was dark. I could see the man laid in the street." The Court then asked her how far away she was at that time, and she indicated in the room, and counsel agreed said indication to be fifteen feet (P.51 L.10-25). This witness also testified that the side lights were lighted (P.52 L.5-15). She said the deceased lay in the gutter about three feet from the curb (P. 52 L. 24-27).

MORRIS ABBOTT, a grocerman with a store in the vicinity of the accident, testified that Miss Baker, the driver of the automobile came in his store to use his telephone; he then went out to the street, and observed at that time that there were no lights lighted on the automobile (P. 55 L. 20-30), and that the deceased lay on the north side of the street (P. 55 L. 30-36). *Standing on the south side of the street he was able to see conditions on the north side of the street* (P. 56 L. 1-10). On cross-examination he said it was getting dark (P. 56 L. 20-26). The deceased lay in the gutter (P. 57 to bottom). This witness placed the distance that the deceased lay from Hope avenue as the length of the court room—about forty-nine or fifty feet (P. 58 L. 20-40).

On re-direct examination (at page 60) he testified that the lights from his grocery store reflected across the street and in addition to that there

was a large arc light on the corner. That the night was a clear night and no fog was present (P. 61 L. 1-5). He repeated that when he came out that the automobile had no lights lighted at the time he saw it. (P. 61, L. 30.).

HARRY PRUZANSKY testified that he was on Jefferson Street at the time of the accident; that he was about 150 feet from the corner of Hope Avenue, and was going towards Hope Avenue, being in the same direction as the automobile was going as well as deceased. He was on the same side of the street as Miss Shaalbach and Miss Thompson (P. 62.) Witness was walking his bicycle along the side-walk. He saw the automobile flash by and did not observe that it had any lights lighted (P. 63 L. 10); that he saw it run into the man who was wheeling the wheel barrow (P. 63 L. 15-20). The man with the wheel-barrow was also going toward Hope Avenue and on the right hand side of the street. That deceased was at a distance of four or five feet from the curb, and was then about sixty or sixty-five feet from the corner of Hope Avenue. He had no difficulty in seeing the man *because he had white overalls on.* (P. 63 L. 20-40). He did not hear the automobile give any warning as it passed (P. 64 L. 7-10). *He saw the front part of the machine strike the deceased in the back* (P. 64 L. 20-25). He testified that there was a large arc light on the corner, as well as a light from the grocery store across the street (P. 65 L. 18-25). The automobile went about twenty feet beyond the man after striking him (P. 65 L. 40), and the deceased was then lying five feet out from the curb (P. 66 L. 12); that the

wheel barrow was lying in a broken condition (P. 66 L. 15).

On cross examination witness testified that the horn was not blown on the automobile. He was asked, "Do you mean that you did not hear it, or will you say there was not any blown?" A. "*There was not any blown, because if there was, if it would be blown, I would hear it.*" (P. 69 L. 35-40). He said there were no lighted head-lights on the automobile (P. 79 L. 1-10). He repeated also in his testimony that the deceased when he first saw him was walking in the street near the side-walk, going towards Hope Avenue; that the deceased was about eighty-five feet ahead of witness; that by reason of the lighted condition of the street it was not difficult to see the deceased (P. 75 L. 20-40).

FRANK BRISCOE, for the plaintiff, an employe of Mr. Abbott, who kept the grocery store across the street from the scene of the accident, testified that he did not see the accident, but ran across the street after it happened, and observed a man lying in the gutter and a wheel-barrow smashed to pieces (P. 85 L. 20-30). The deceased lay about three or four feet out from the curb (P. 86 L. 1-5), on the right side of the street and at a point about forty feet from Hope Avenue (P. 86 L. 5-15). He was asked, "*At that time could you see across the street if you looked?*" A. "*Yes, sir.*" Q. "*The light from your store, how far does that shine?*" A. "*It shines way down there and there is an electric light on the corner, so you can see way down there.*" (P. 86 L. 20-26).

This evidence together with the proof of damage, administration, &c., ended the plaintiff's case.

Comment.

It was upon this evidence that the defendant asked a non-suit. By the evidence it clearly appeared that the deceased was pushing a wheel-barrow along Jefferson Street on the right side approaching Hope Avenue; that he was four or five feet from the curb; *that he wore white overalls*; that there was a large arc light on the corner, and the light from the store across the street so lighted up the scene of the accident that the deceased was well observable by witnesses eighty feet behind him and by other witnesses forty feet away from him, and according to the testimony of the grocer's boy and his employer, Mr. Abbott, they could see conditions from across the street. This being so, it must of course follow that the driver of the automobile, which deliberately approached this man from behind and struck him down as appears by the evidence, could not have been using her eyes, or she would have been bound to have seen deceased in front of her. It is therefore, clear that with the deceased in plain view in front of her machine, and she giving him no warning, that she was to say the least, guilty of negligence in failing to avoid striking him, or giving him warning that he might have gotten out of the way. The motion for the non-suit under the circumstances was very properly denied. There was absolutely nothing from which contributory negligence could be inferred on the part of the deceased, and ample evidence to show that the defendant was guilty of negligence.

POINT II.**The Motion to Direct a Verdict in Favor of the Defendant Was Properly Denied.**

LILLIAN BAKER, the first witness for the defendant testified that she was driving along Jefferson Street approaching Hope Avenue; that her side lights were lighted but her head lights were not (P. 91 L. 20-30). Her own story of the accident convicts her of negligence. She thus says: "I was driving along Jefferson Street, *and never thinking anything* was going to occur when suddenly this man appeared to loom up, all of a sudden before me, and, before I could, why, he was only two or three feet in front of me when I saw him, when I quick turned my wheel to the left, to turn my car over to the left, but I did not ride over him, it must have been the back of the car that struck him. I stopped the car" (P. 91 L. 30-40). She estimated her speed as about eleven to twelve miles an hour (P. 92 L. 30-37). She testified that she blew her horn but not for the purpose of warning the deceased, but because of the fact that she was about to approach a corner. She blew it about half a minute before the accident (P. 93 L. 15-20). She was asked by her counsel: "Did you see anybody in the street?" A. "No, absolutely not." "Q. "When is the first you saw of this person?" A. "Why, just as I was within two or three feet of him." Q. "Where was he with reference to your machine, what position was he in?" A. "Why he was almost turned, with his

back to me." Q. What?" A. "Almost with his back towards me." (P. 93 L. 30-40); that he was pushing a wheel barrow (P. 94 L. 7-10). She had no idea where he came from (P. 94 L. 18-20). She was asked by the Court as to how far from the right hand side of the road she was, and she answered about six feet (P. 95 L. 12-20). When she got out of the machine the deceased lay behind it (P. 95 at bottom).

On cross examination she testified that she had had her mother and father out that day. That she was out on her father's business (P. 97 L. 30-40). She knew nothing of the accident until she heard some coal and wood falling (P. 98 L. 1-7). She was asked if the store lights were lighted, but made no answer (P. 100 L. 40); that the electric light on the corner was lighted (P. 101 L. 1). In answer to the Court's question, she said with the side lights burning she could see about ten feet ahead (P. 102), yet she drove her car at a speed of eleven or twelve miles an hour (P. 102 L. 20-24). That witness was not looking may be gathered from the fact that in answer to a question she said, "*How should I know that people walk in the road.*" (P. 105 L. 16).

MARY CHINTALA, a sister of Miss Baker was riding in the car at the time of the accident. Her story of the accident is as follows: "As we came from First Street we were coming near Hope Avenue, when all of a sudden my sister says, "Oh," and she quick turned her wheel and after she turned her wheel, I heard a crash and she stopped and went up and we saw what had happened, and I asked sister to please run to the corner for

an ambulance and she did so." (P. 106 L. 10-20).
Q. "When was the first you saw this man?" A. "When?" Q. "Yes." A. "Just when my sister, she said, "Oh" we were about two feet from him when she quick turned her wheel." (P. 106 L. 28-33).

This witness made no attempt to say that any warning was given to the deceased. She merely testified that she blew a horn as she approached the street crossing. She was asked, "Did you see the man when she tooted her horn?" A. "No, sir." (P. 107 L. 12). On cross examination she testified to the fact that the big arc light on the corner of Jefferson Street and Hope Avenue was lighted and that there was a store on the corner and that the windows were lighted. (P. 108 L. 15-23).

These were the only witnesses produced by the defendant who testified as to the accident itself. Several other witnesses were sworn as to whether the machine was lighted before the accident or after the accident, as for instance, Richard Soper, the chauffeur on the ambulance, testified amongst other things that he found the deceased lying close to the curb on the right side of the street (P. 122). That when the body of the deceased was brought home he had white overalls on. This ended the case.

On this evidence counsel for the defendant had the assurance to ask the court to direct a verdict in favor of the defendant. Usually in cases like this, sharp questions of fact arise between the

witnesses on the part of the plaintiff and defendant as to the occurrence of the accident, but in this case the two highly interested witnesses, the driver and her sister are the only witnesses as to how the accident happened, and one looks in vain through their testimony for any explanation of it, they simply did not see the deceased. In the testimony of Lillian Baker, the driver of the machine, she states that she could see at least ten feet ahead of her machine with the side lights burning, yet she did not see deceased until she was two feet away.

JOHN CRAWBUCK, a police officer, who arrived on the scene after the accident was produced by the defendant to show that the scene of the accident was not well lighted. Yet testified that he marked in his note book by the light of the arc light, while he was standing at the place of the accident (P. 121 L. 1-5). If it was bright enough for this police officer to write in his note book, surely an object like a grown man should have been visible at least twenty or thirty feet ahead of the machine.

On this motion for non-suit and directed verdict, the best that can be said for the defendant is that there was a question of fact for the jury, although counsel feel that the trial judge would have been justified in practically directing a jury to find a verdict in favor of the plaintiff on the question of negligence.

PONIT III.**The Court Did Not Charge the Jury Improperly.**

Under this point is considered the third reason alleged for a new trial. The alleged improper charge is as follows:

“I cannot recall myself any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident.”

This question is unfair. The court indeed did use those exact words, but it should be taken in connection with the rest of his language, whereby the question of contributory negligence was left to the jury. The charge on the point including the quoted language is as follows:

“You may also consider, gentlemen, whether there was any contributory negligence on the part of the deceased. I cannot recall myself any testimony in the case which shows deceased did anything which was careless or negligent or contributed to the accident.” (P. 127-128).

Also in the closing of his charge he added the following:

“So, take the case, gentlemen, and determine, first, was there negligence on the part of the defendant, acting through the driver of the car? If there was, and *there was no*

contributory negligence, then you take up the question of damage, &c.," (P. 129 L. 25-35).

When counsel for the defendant took exception to the language mentioned in the third ground of appeal, the Court said: "*I agree that it is for the jury to determine. And I think I merely said that that I did not recall any evidence of contributory negligence. But it is for the jury to find.*" (P. 130 L 10-15).

The case of *Anderson v. Public Service Railway Co.*, cited by counsel for defendant in his brief at page 8 deals with the question of a plaintiff walking along a public highway, and a car coming behind him and striking him, no signal or other warning being given. Under those circumstances the court held that the question of negligence and contributory negligence was for the jury. The *Anderson* case was not a case nearly so strong in favor of the plaintiff as the case at bar. It appears from reading the opinion of the Court of Errors and Appeals (P. 702 L. 81, N. J. L.), that the plaintiff *Anderson* was walking along a highway and to avoid an automobile which was overtaking him he stepped to one side, close to the rails of defendant's tracks.

Counsel for defendant in citing the *Anderson* case in his brief makes the statement that the important difference between that case and the case at bar was that it was day light at the time of the occurrence of the accident in the *Anderson* case. The evidence, however, before the jury, both on the part of the plaintiff and some evidence on the part of the defendant show that it was dusk, not

dark, and that there was light from the arc light on the corner and from two stores, that made the deceased in clear view to persons happening along the street.

The case of *Buttelli v. Electric Ry. Co.*, 59 N. J. Law, page 303, another case cited by counsel in his brief is plainly in point with plaintiff's contention. We respectfully refer to the court this case for its consideration, especially the first, third and sixth syl.

POINT IV.

No Error Is Showed by Defendant Under His Fourth Ground of Appeal.

The alleged error arises out of the following circumstances. The jury had retired to consider the verdict, and after some time sent in a communication to the court that they desired to ask a question, and the court then received the following question: "Whether a wheel-barrow is supposed to have a light on?" and the court answered, "A wheelbarrow is not obliged by law to have a light under the conditions here disclosed, and the man is not obliged to carry a light either."

Even conceding for the purpose of argument that the court had been in error, nevertheless such point could not be considered at this time, as no exception was taken to the court's ruling. The record discloses the fact that no such exception was taken.

However, there was no error in the trial judge's charge, as counsel for the defendant does not in

his brief point out any law to the effect that the deceased was obliged to carry a light on his wheelbarrow. Counsel for defendant's only point in connection with a light on the wheelbarrow is that the jury might have concluded that they could not consider the question of contributory negligence. We cannot see how such an inference can be drawn. However, aside from any question of what inferences may be drawn one way or the other, the fact that the court was asked a question and answered it, and presumably from the brief of the defendant, he answered it correctly.

CONCLUSION.

It is, therefore, respectfully submitted that the judgment below should be affirmed.

June term, 1917.

Respectfully,

WARD & McGINNIS,

Attorneys of Plaintiff-Respondent.

